TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 541

GERTRUDE VANDERBILT WHITNEY AND CORNELIUS VANDERBILT, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ALICE G. VANDERBILT, DECEASED, ET AL., APPELLANTS,

vs.

STATE TAX COMMISSION OF THE STATE OF NEW YORK

APPEAL FROM SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK

FILED NOVEMBER 18, 1939.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 28, 1939.

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IN SURROGATE'S COURT, COUNTY OF NEW YORK

Notice of Appeal P-1177—1934

In the Matter of the Appraisal under the Estate Tax Law of the Estate of ALICE G. VANDERBILT, Deceased

NOTICE OF APPEAL TO APPELLATE DIVISION OF EXECUTORS AND OF CORNELIUS VANDERBILT, INDIVIDUALLY, AND OF GLADYS SZECHENYI

SIRS:

Please take notice that Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the last will and testament of Alice G. Vanderbilt, deceased, said Cornelius Vanderbilt, individually, and Gladys Szechenyi, hereby appeal to the Appellate Division of the Supreme Court for the First Judicial Department, from the order of the Surrogate's Court of the County of New York made and entered herein on the 28th day of September, 1937, modifying the pro forma order of said Surrogate's Court made and en- [fol. 3] tered herein the 13th day of July, 1936, assessing, fixing and determining the estate tax herein and from each and every part of said order made and entered herein on the 28th day of September, 1937, except only so much and such part thereof as sustains the appeals from said pro forma order to the extent of excluding from the gross estate of said Alice G. Vanderbilt, deceased, that part of the principal of the trust created under the Seventh Clause of the will of Cornelius Vanderbilt, deceased, which passed to Gerturde Vanderbilt Whitney, William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt.

Dated, New York, N. Y., October 27, 1937.

Yours, etc., Anderson, Gasser, Ferris & Anderson, Attorneys for Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the last will and testament of Alice G. Vanderbilt, deceased, and said Cornelius Vanderbilt, individually, Office and P. O. Address, 20 Pine Street, Borough of Manhattan, City of New York. Root, Clark, Buckner & Ballantine, Attorneys for Gladys Szechenyi, Office and P. O. Address, 31 Nassau Street, Borough of Manhattan, City of New York.

To: Charles P. Sheridan, Esq., Clerk of the Surrogate's [fol. 4] Court, New York County. Edgar Hirschberg, Esq., Attorney for State Tax Commission, 80 Centre Street, New York, N. Y. Le Boeuf, Winston, Machold & Lamb, Esqs., Attorneys for Cathleen Vanderbilt Lowman, 15 Broad Street, New York, N. Y. Cadwalader, Wickersham & Taft, Esqs., Attorneys for Thomas B. Gilchrist as General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant, 14 Wall Street, New York, N. Y. Thomas B. Gilchrist, Esq., As General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant, 14 Wall Street, New York, N. Y.

In Surrogate's Court, New York County

Notice of Appeal to Appellate Division of Gloria Laura Morgan Vanderbilt, Infant, and of Thomas B. Gilchrist as General Guardian of Her Property

Sirs:

Please take notice that Gloria Laura Morgan Vanderbilt, infant, by Thomas B. Gilchrist, as General Guardian of her property, and Thomas B. Gilchrist, as General Guardian of the property of said infant, hereby appeal to the Appellate [fol. 5] Division of the Supreme Court, for the First Judicial Department, from the order of the Surrogates' Court of the County of New York made and entered herein on the 28th day of September, 1937, modifying the pro forma order of said Surrogates' Court made and entered herein on the 13th day of July, 1936, assessing, fixing and determining the estate tax herein, and from each and every part of said order made and entered herein on the 28th day of September, 1937, except only so much and such part thereof as sustains the appeals from said pro forma order to the extent of excluding from the gross estate of Alice G. Vanderbilt, deceased, that part of the principal of the trust created under the Seventh Clause of the will of Cornelius Vanderbilt, deceased, which passed to Gertrude Vanderbilt Whitney, William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt.

Dated: New York, N. Y., October 27, 1937.

Yours, etc., Thomas B. Gilchrist, As General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant, Office and Post Office Address: No. 14 Wall Street, Borough of Manhattan, City of New York. Cadwalader, Wickersham & Taft, Attorneys for Thomas B. Gilchrist as General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant, Office and Post Office Address: No. 14 Wall Street, Borough of Manhattan, City of New York.

[fol. 6] To: Charles P. Sheridan, Esq., Clerk of the Surrogates' Court of the County of New York, Hall of Records, New York, N. Y. Edgar Hirschberg, Esq., Attorney for State Tax Commission, 80 Centre Street, New York, N. Y. Anderson, Gasser, Ferris & Anderson, Attorneys for Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the last will and testament of Alice G. Vanderbilt, deceased, and said Gertrude Vanderbilt Whitney and said Cornelius Vanderbilt, individually, 20 Pine Street, New York, N. Y. Root, Clark, Buckner & Ballantine, Esqs., Attorneys for Gladys Szechenyi, 31 Nassau Street, New York, N. Y. Le Boeuf, Winston, Machold & Lamb, Esqs., Attorneys for Cathleen Vanderbilt Lowman, 15 Broad Street, New York, N. Y.

IN SURROGATE'S COURT, NEW YORK COUNTY

NOTICE OF APPEAL TO APPELLATE DIVISION OF CATHLEEN VANDERBILT LOWMAN

SIRS:

Please take notice that Cathleen Vanderbilt Lowman hereby appeals to the Appellate Division of the Supreme [fol. 7] Court, for the First Judicial Department, from the order of the Surrogate's Court of the County of New York made and entered herein on the 28th day of September, 1937, modifying the pro forma order of said Surrogate's Court made and entered herein on the 13th day of July, 1936, assessing, fixing and determining the estate tax herein, and from each and every part of said order made

and entered herein on the 28th day of September, 1937, except only so much and such part thereof as sustains the appeals from said pro forma order to the extent of excluding from the gross estate of Alice G. Vanderbilt, deceased, that part of the principal of the trust created under the Seventh Clause of the will of Cornelius Vanderbilt, deceased, which passed to Gertrude Vanderbilt Whitney, William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt.

Dated: New York, N. Y., October 27, 1937.

Yours, etc., Le Boeuf, Winston, Machold & Lamb, Attorneys for Cathleen Vanderbilt Lowman, Office and Post Office Address: 15 Broad Street, Borough of Manhattan, City of New York.

To: Charles P. Sheridan, Esq., Clerk of the Surrogates' Court of the County of New York, Hall of Records, New York, N. Y. Edgar Hirschberg, Esq., Attorney for State Tax Commission, 80 Centre Street, New York, N. Y. [fol. 8] Anderson, Gasser, Ferris & Anderson, Attorneys for Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the last will and testament of Alice G. Vanderbilt, deceased, and said Cornelius Vanderbilt, individually, 20 Pine Street, New York, N. Y. Root, Clark, Buckner & Ballantine, Esqs., Attorneys for Gladys Szechenyi, 31 Nassau Street, New York, N. Y. Cadwalader, Wickersham & Taft, Esqs., Attorneys for Thomas B. Gilchrist as General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant; 14 Wall Street, New York, N. Y.

IN SURROGATE'S COURT, COUNTY OF NEW YORK

NOTICE OF APPEAL TO APPELLATE DIVISION OF STATE TAX COMMISSION

SIRS:

Please take notice that the State Tax Commission of the State of New York hereby appeals to the Appellate Division of the Supreme Court of the State of New York for the First Department from the order entered in the above entitled proceeding in the office of the Clerk of the Surro- [fol. 9] gate's Court of the County of New York on the

28th day of September 1937, and from each and every part of said order.

Dated: New York, N. Y., Nov. 8, 1937.

Edgar Hirschberg, Attorney for State Tax Commission, Office and Post Office Address, 80 Centre Street, New York, N. Y.

To: Anderson, Gasser, Ferris & Anderson, Esqs., Attorneys for Executors, 20 Pine Street, New York City. Root, Clark, Buckner & Ballentine, Esqs., Attorneys for Gladys Szechenyi, 31 Nassau Street, New York City. Le Boeuf, Winston, Machold & Lamb, Esqs., Attorneys for Cathleen Vanderbilt Lowman, 15 Broad Street, New York City. Cadwalder, Wickersham & Taft, Esqs., Attorneys for Thomas B. Gilchrist, 14 Wall Street, New York City.

Charles P. Sheridan, Esq., Clerk of Surrogate's Court, County of New York.

[fol. 10] In Surrogate's Court, County of New York

Order Appealed From—September 28, 1937

Present: Hon. James A. Foley, Surrogate.

Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, individually and as executors of the last will and testament of Alice G. Vanderbilt, deceased, Gladys Szechenyi, daughter of the said decedent, Cathleen Vanderbilt Lowman, daughter of Reginald C. Vanderbilt, deceased son of said decedent, Gloria Laura Morgan Vanderbilt, infant daughter of Reginald C. Vanderbilt, deceased son of said decedent, by Thomas B. Gilchrist as General Guardian of her property, and Thomas B. Gilchrist as General Guardian of the property of said infant, having appealed to this Court from the appraisal of the property of the said decedent as made in the report of Jacob Manicoff the appraiser herein, which report was filed herein on the 25th day of May, 1936, and from the order of the Surrogate assessing, fixing and determining the estate tax upon the property of the said decedent made and entered herein on the 13th day of July, 1936, on the grounds that

(1) the inclusion in the gross estate of the decedent Alice G. Vanderbilt of the property or any part of the property constituting the principal of the trust created by the

[fol. 11] Seventh Clause of the will of Cornelius Vanderbilt, deceased, which property has been appraised herein at $5,935,572.07 and over which property said Alice G. Vanderbilt exercised by the Third Article of her will the special or limited power of appointment granted to her by the Eighth Clause of said will of Cornelius Vanderbilt, was erroneous and illegal;

(2) the inclusion in the gross estate of the decedent Alice G. Vanderbilt of so much of the principal of said trust created by the Seventh Clause of said will of Cornelius Vanderbilt, deceased, as passed to Gertrude Vanderbilt Whitney, to wit, the sum of $150,000, and of so much of said principal as passed in equal shares to William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt, sons of Alfred G. Vanderbilt, deceased, to wit, the sum of $500,000, was erroneous and illegal;

and upon other grounds as set forth in the respective notices of appeal herein, all as more fully appears from the respective notices of appeal heretofore filed herein, to which reference is hereby made for a statement of the grounds of the appeal of said parties as if said grounds of appeal were fully set forth and recited herein,

And said appeals having duly come on to be heard before me,

Now, on reading said report of said appraiser, said notices of appeal, the affidavits of Ray C. Gasser, sworn to respectively September 3, 1936 and February 1, 1937, both duly filed herein on the 2nd day of February, 1937, and upon all of the proceedings and papers heretofore had and filed herein, and after hearing Roy C. Gasser, Esq., of Anderson, [fol. 12] Gasser, Ferris & Anderson, of counsel for said Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, individually and as executors of the last will and testament of Alice G. Vanderbilt, deceased, Arthur A. Ballantine, Esq., of Root, Clark, Buckner & Ballantine, of counsel for said Gladys Szechenyi, Horace R. Lamb, Esq., of LeBoeuf, Winston, Machold & Lamb, of counsel for said Cathleen Vanderbilt Lowman, Thomas B. Gilchrist, Esq., and Hampton D. Ewing, Jr., Esq., of Cadwalader, Wickersham & Taft, of counsel for Thomas B. Gilchrist as General Guardian of the property of said Gloria Laura Morgan Vanderbilt, infant, all in support of said appeals, and Sol Zaretski, Esq.,

of counsel for the State Tax Commission, in opposition thereto, and due deliberation being had, and the opinion and decision of the Surrogate having been filed herein on the 7th day of June, 1937, it is

Ordered and adjudged that out of the principal of the trust created under the Seventh Clause of the will of Cornelius Vanderbilt, deceased, the sum of $150,000. which passed to Gertrude Vanderbilt Whitney and the further sum of $500,000 which passed in equal shares to William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt, sons of Alfred G. Vanderbilt, deceased, were erroneously and illegally included in the gross estate of the decedent Alice G. Vanderbilt for the purposes of taxation under the provisions of Article 10-C of the Tax Law, and it is further

Ordered and adjudged that each of the appeals herein be and the same hereby is sustained as to the ground of appeal hereinbefore numbered "(2)", and it is further

Ordered and adjudged that the provisions of subdivision 7-a of Section 249-r of Article 10-C of the Tax Law are [fol. 13] applicable to so much of the trust fund created under the Seventh Clause of the will of said Cornelius Vanderbilt, deceased, as passed to Cathleen Vanderbilt Lowman, Gloria Laura Morgan Vanderbilt and Gladys Szechenyi, and that said provisions of subdivision 7-a of Section 249-r of Article 10-C of the Tax Law require that the value thereof, to wit, the sum of $5,285,572.07 (being the value of said trust fund as heretofore appraised herein less the sum of $650,000) be included in the gross estate of said Alice G. Vanderbilt, deceased, for the purpose of assessing, fixing and determining the estate tax upon the estate of said deceased imposed by Article 10-C of the Tax Law, and it is further

Ordered and adjudged that the provisions of subdivision 7-a of Section 249-r of Article 10-C of the Tax Law, in so far as the provisions thereof are hereby held to be applicable to the trust fund created by the Seventh Article of the will of said Cornelius Vanderbilt, deceased, over which the decedent Alice G. Vanderbilt exercised by Article Third of her will the special or limited power of appointment granted to her by the Eighth Clause of said will of Cornelius Van-

derbilt are valid and constitutional and do not violate Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States or Article 1, Section 6 of the Constitution of the State of New York; and that the inclusion of the value of said trust fund to the extent herein directed in the gross estate of said Alice G. Vanderbilt, deceased, for the purposes of assessing, fixing and determining the estate tax upon the estate of said Alice G. Vanderbilt, deceased, does not violate Section 1 of the Fourteenth Article of Amendment to the Constitution of the United [fol. 14] States or Article I, Section 6 of the Constitution of the State of New York, and it is further

Ordered and adjudged that, except as hereinbefore provided, each of said appeals be and the same hereby is overruled as to each of the grounds of appeal set forth in the respective notices of appeal heretofore filed herein, and it is further

Ordered and adjudged that the order entered herein on the 13th day of July, 1936, be and the same hereby is modified accordingly, and that the market value of the gross estate of said Alice G. Vanderbilt, deceased, at the time of her death, the amount of exemptions and deductions allowed from said gross estate, the net amount of said estate which is subject to tax under the provisions of Article 10-C of the Tax Law, and the amount of tax to which the same is liable shall be and the same hereby is assessed, fixed and determined as follows:

Gross estate	$10,120,907.17
Total deductions allowed by statute	766,319.32
Net estate	$9,354,587.85
Tax on net estate not in excess of $150,000 less $36,200 exemptions allowed under Section 249-q	$1,138.00
Tax on net estate in excess of $150,000	1,211,371.69
Total tax	$1,212,509.69

J. A. F., Surrogate.

[fol. 15] IN SURROGATE'S COURT, COUNTY OF NEW YORK

PETITION FOR APPRAISER

To the Surrogate's Court of the County of New York:

The petition of Cornelius Vanderbilt respectfully shows:

First. That your petitioner is one of the executors under the last Will and Testament of Alice G. Vanderbilt, deceased, and as such is a person interested in the estate of the said deceased.

Second. That the said decedent departed this life on the 22nd day of April, 1934, at 1 East 67th Street, New York City, New York; that the said deceased was a resident of the County of New York.

Third. That letters testamentary on the estate of said deceased were, on the 29th day of May, 1934, issued to your petitioner and Gertrude Vanderbilt Whitney by the Surrogate's Court of the County of New York, and that their post-office addresses are: Gertrude Vanderbilt Whitney, 871 Fifth Avenue, New York City, New York; Cornelius Vanderbilt, 640 Fifth Avenue, New York City, New York.

Fourth. That, as your petitioner is informed and believes, the estate of said decedent, is or may be subject to the payment of the tax imposed by law on the estates of deceased persons.

[fol. 16] Fifth: That all persons who are interested in said estate and who are entitled to notice of all proceedings herein, and their post-office addresses are as follows:

The State Tax Commission, Albany, N. Y.
Gertrude Vanderbilt Whitney, 871 Fifth Avenue, New York City, N. Y.
Countess Gladys Szechenyi, 35 Eton Place, London, England.
Cornelius Vanderbilt, 640 Fifth Avenue, New York City, N. Y.
Flora Whitney Miller, Old Westbury, Nassau County, N. Y.
Pamela Tower, Old Westbury, Nassau County, N. Y.
Whitney Tower, Old Westbury, Nassau County, N. Y.

Flora MacCulloch Miller, Old Westbury, Nassau County, N. Y.
Leverett Miller, Old Westbury, Nassau County, N. Y.
Cornelius Vanderbilt Whitney, Old Westbury, Nassau Caunty, N. Y.
Harry Payne Whitney, 2nd, Old Westbury, Nassau County, N. Y.
Marie Nancy Whitney, Old Westbury, Nassau County, N. Y.
Barbara Whitney Henry, Old Westbury, Nassau County, N. Y.
Gertrude Whitney Henry, Old Westbury, Nassau County, N. Y.
William Barklie Henry, Old Westbury, Nassau County, N. Y.
Cornelius Vanderbilt, Jr., Reno, Nevada.
Grace Vanderbilt Davis, 4 East 72nd Street, New York City, N. Y.
Cornelia Vanderbilt Davis, 4 East 72nd Street, New York City, N. Y.
Cornelia S. Roberts, 1901 23rd Street, Washington, D. C.
Gladys Roberts, 1901 23rd Street, Washington, D. C.
Countess Alice Hadik, Seregelyes, Fejer M, Hungary.
Laszlo Hadik, Seregelyes, Fejer M, Hungary.
Bela Hadik, Seregelyes, Fejer M, Hungary.
Gladys Szechenyi, 35 Eton Place, London, England.
[fol. 17] Sylvia Szechenyi, 35 Eton Place, London, England.
Nandine Szechenyi, 35 Eton Place, London, England.
William H. Vanderbilt, Oakland Farm, Portsmouth, R. I.
Emily Vanderbilt, Oakland Farm, Portsmouth, R. I.
Ellen French Vanderbilt, Oakland Farm, Portsmouth, R. I.
Anne Colby Vanderbilt, Oakland Farm, Portsmouth, R. I.
Alfred G. Vanderbilt, Banyan Road, Palm Beach, Florida.
George Vanderbilt, Banyan Road, Palm Beach, Florida.
Cathleen Vanderbilt Lowman, Longridge and Riverbank Roads, Stamford, Conn.

Harry Cook Cushing, 4th, 125 East 63rd Street, New York City, N. Y.
Gloria Laura Morgan Vanderbilt, Old Westbury, Nassau County, N. Y.
Count Laszlo Szechenyi, 35 Eton Place, London, England.
Alice Vanderbilt Morris, 415 Lexington Avenue, New York City, N. Y.
Gloria Morgan Vanderbilt, 49 East 72nd Street, New York City, N. Y.
William E. Shepherd, 21 East 82nd Street, New York City, N. Y.
Maude Gwynne Harrah, Mt. Kisco, Westchester County, N. Y.
Society of St. Johnland, Kings Park, Long Island, N. Y.
Newport Hospital, Newport, Rhode Island.
St. Bartholomew's Church, 109 East 56th Street, New York City, N. Y.
William Annett, 53 East 79th Street, New York City, N. Y.
Thomas Clancy, 24 East 72nd Street, New York City, N. Y.
Alma Petersen, 993 Fifth Avenue, New York City, N. Y.
Elsa Anderson, 993 Fifth Avenue, New York City, N. Y.
William Crane, as Executor under the will of Mary Crane, deceased, 796 Fairmount Place, Bronx, New York.
Teresa Turner, 304 Broadway, Newport, Rhode Island.
[fol. 18] Margaret MacNamara, 6111 64th Street, Maspeth, L. I.
Sheila Sheehan (formerly known as Sheila Sweeney), West End, Rathmore, County Kerry, Ireland.
John Fenton, 20 East 65th Street, New York City, N. Y.
John Cunningham, 1 East 67th Street, New York City, N. Y.
Augustus Tebbit, The Breakers, Newport, Rhode Island.
Cornelius Riley, The Breakers, Newport, Rhode Island.

John Harrington, The Breakers, Newport, Rhode Island.

William Murphy, Coggeshall Avenue, Newport, Rhode Island.

Joseph Sylvester, 5 Potter Street, Newport, Rhode Island.

William Neilson, 5 Conrad Court, Newport, Rhode Island.

John Brady, 22 Newport Avenue, Newport, Rhode Island.

Charles Knittel, 2726 Valentine Avenue, New York City, N. Y.

John Gallagher, 341 East 85th Street, New York City, N. Y.

John Mitchell, 1 East 67th Street, New York City, N. Y.

Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Trustees of the trust created by the Fourteenth Clause of the Will, 230 Park Avenue, New York City, N. Y.

United States Trust Company of New York, 45 Wall Street, New York City, N. Y.

George W. Wickersham, Esq., and Thomas B. Gilchrist, Esq., as General Guardians of the Estate of Gloria Laura Morgan Vanderbilt, infant, 14 Wall Street, New York City, N. Y.

Guaranty Trust Company of New York, 5th Avenue & 44th Street, New York City, N. Y.

That all the above-named are of full age and sound mind, except: Cornelia Vanderbilt Davis, Pamela Tower, Whitney Tower, Flora MacCulloch Miller, Leverett Miller, Harry [fol. 19] Payne Whitney, 2nd, Marie Nancy Whitney, Gertrude Whitney Henry, William Barklie Henry, Gladys Roberts, Laszlo Hadik, Bela Hadik, Gladys Szechenyi, Sylvia Szechenyi, Nandine Szechenyi, Emily Vanderbilt, Ellen French Vanderbilt, Anne Colby Vanderbilt, George Vanderbilt, Harry Cook Cushing, 4th, and Gloria Laura Morgan Vanderbilt.

That the gross value of the estate of the decedent, wherever situated, is more than $10,000.

That no previous application has been made for an order granting the relief prayed for in this petition.

That there are no persons, other than those herein mentioned, interested in this proceeding.

Wherefore, your petitioner prays that you will designate an appraiser, as provided by law, to fix, under Article 10-C, Chapter 60 of the Consolidated Laws of 1909, and the Acts amendatory thereof and supplemental thereto, the fair market value of the property, of the estate of the above-named decedent, subject to the payment of the estate tax, and to do such other thing or things in the premises as he may be authorized to do by virtue of his office under the said provision of law.

Dated, New York, February 18th, 1935.

Cornelius Vanderbilt, Petitioner.

[fol. 20] *Duly sworn to by Cornelius Vanderbilt. Jurat omitted in printing.*

[fol. 21] IN SURROGATE'S COURT, COUNTY OF NEW YORK

[Title omitted]

ORDER DESIGNATING APPRAISER—Feb. 21, 1935

On reading and filing the petitions filed in the above-named estates, I do hereby, pursuant to the requirement of the Tax Law, direct Jacob Manicoff, Esq., one of the appraisers appointed by the State Tax Commission under said statute, to fix the fair market value of the property which was of the above-named decedents, to declare the value of such interest or interests therein as may be subject to the payment of the transfer or estate tax, to declare exempt from such tax such interest or interests as he may find to be exempt, and to do such other thing or things in the premises as he may be authorized to do, by virtue of his office under the said provision of law.

J. A. F., Surrogate.

[fol. 22] IN SURROGATE'S COURT, COUNTY OF NEW YORK

[Title omitted]

REPORT OF APPRAISER

To the Surrogate's Court of the County of New York:

I, Jacob Manicoff, Estate Tax Appraiser, having been designated by Hon. James A. Foley, Surrogate of the County

of New York, by an order duly made and entered on the 21st day of February, 1935, to appraise the estate of the above-named decedent, pursuant to the provisions of the Law imposing a tax on estates of residents and non-residents, and the statutory notice by mail having been duly given herein to all the persons entitled thereto as provided in Section 249-v of the Tax Law as appears by copy of such notice and affidavit of mailing thereof hereunto annexed, and having held an appraisal on the 11th day of May, 1936, at the Office of the Estate Tax Appraiser for the County of New York, and having heard the allegations and proofs of the parties then and there appearing before me and offering the same, and having given due consideration to the affidavits and other papers submitted herein, and having made due and careful inquiry into all the matters and things brought before me in this proceeding, do now make and file the following report:

First.—I report that the decedent herein died a resident of the State of New York on the 22nd day of April, 1934, [fol. 23] leaving a Last Will and Testament, copy of which is hereunto annexed, which was duly admitted to probate by this Court on the —— day of ——, 19—, and that thereafter on the 29th day of May, 1934, Letters Testamentary upon the estate of the said decedent were duly issued by this Court to Gertrude Vanderbilt Whitney, 871 Fifth Avenue, New York, N. Y. and Cornelius Vanderbilt, 640 Fifth Avenue, New York, N. Y. as Executors.

Second.—I further report the following appearances in this proceeding:

Edgar Hirschberg, Esq., Attorney for State Tax Commission, 80 Centre Street, New York, N. Y.

Anderson, Gasser, Ferris & Anderson, Esqs., Attorneys for Executors, 20 Pine Street, New York, N. Y.

Third.—I further report that I found the property comprising the gross estate of the decedent herein to consist of the items set forth in the annexed affidavit for appraisal, and that the fair market value of each of the said items at the date of decedent's death is the amount set down by me opposite such item in the column designated "Value as appraised in this proceeding," and that the sums properly to be allowed as deductions herein for the purpose of de-

termining the net estate are the amounts set down by me after the several items claimed in the column designated "Allowed in this proceeding," as a result of which I find the said gross estate and deductions to be as shown in the following summary:

[fol. 24] Assets:

Schedule A—Real Estate	$660,000.00
Schedule B—Stocks and Bonds	2,013,495.64
Schedule C—Mortgages, Notes, Cash and Insurance	1,247,252.31
Schedule D-1—Jointly Owned Property	0.00
Schedule D-2—Other Miscellaneous Property	820,284.02
Schedule E—Transfers	94,303.13
Schedule F—Powers of Appointment	5,935,572.07
Schedule G-1—Property Identified as Previously Taxed	0.00
Gross Estate	$10,770,907.17

Subject to Deductions as follows:

Schedule G-2—Property Identified as Previously Taxed	$0.00	
Schedule H—Funeral and Administration Expenses	76,340.28	
Schedule I—Debts	107,090.15	
Schedule J—Mortgages, Net Losses, and Support of Dependents	402,888.89	
Schedule K—Charitable, Public, and Similar Gifts and Bequests	180,000.00	
Total Deductions		$766,319.32
The net estate, I appraise at		$10,004,587.85

Fourth.—I further report that the decedent died a nonresident of this State and that the total valuation of real property situated and tangible personal property having an actual situs within this State is $—.

(This paragraph applies only if the decedent was in fact a nonresident as shown in paragraph 1.)

[fol. 25] Fifth—I further report the amount of exemptions allowed under § 249-q to be:

Beneficiaries	Relationship	Amount of exemption
Cornelius Vanderbilt Whitney	Grandson	$150.00
Alfred G. Vanderbilt	Grandson	5,000.00
Cornelia S. Roberts	Granddaughter	200.00
Countess Alice Hadik	Granddaughter	5,000.00
Gladys Szechenyi (Infant)	Granddaughter	200.00
Sylvia Szechenyi (Infant)	Granddaughter	200.00
Nandine Szechenyi (Infant)	Granddaughter	200.00
Cathleen Vanderbilt Lowman	Granddaughter	5,000.00
Gloria Laura Morgan Vanderbilt (Infant)	Granddaughter	5,000.00
Gertrude Vanderbilt Whitney	Daughter	5,000.00
William H. Vanderbilt	Grandson	5,000.00
George Vanderbilt	Grandson	5,000.00
Countess Gladys Szechenyi	Daughter	5,000.00
Count Laszlo Szechenyi	Son-in-law	5,000.00
Gloria Morgan Vanderbilt	Daughter-in-law	5,000.00
Cornelius Vanderbilt	Son	5,000.00
Insurance		0
Total exemptions		$55,950.00

Respectfully submitted,

Jacob Manicoff, Appraiser.

Dated: New York, N. Y., May 25, 1936.

[fol. 26] In Surrogate's Court, County of New York

Excerpts From Return and Schedules Filed by Executors

State of New York,
County of New York ss:

Cornelius Vanderbilt, executor of the estate of the above-named decedent being duly sworn in this proceeding for the determination of the tax, if any, to be paid upon the assets of the said estate under Article 10-C of the Tax Law, deposes and says that as such executor deponent is personally familiar with affairs of the said estate, the property constituting the assets thereof, their fair market value, and the debts, expenses and charges properly allowable as deductions therefrom, and makes the following return:

General Information:

1. Date of death April 22, 1934.

2. Resident of New York County.

3. Did the decedent leave a will? (Answer "Yes" or "No") Yes.

If the answer is "yes" attach copy of last will.

4. Letters testamentary, were issued on May 29, 1934 by the Surrogate's Court of New York County.

5. The names and post office addresses of the executors are:

Name	Post Office Address
Gertrude Vanderbilt Whitney	871 Fifth Avenue, New York City, N. Y.
Cornelius Vanderbilt	640 Fifth Avenue, New York City, N. Y.

[fol. 27] Gross Estate

Schedule A—Real Estate:

6. Did the decedent at the time of death own any interest in real estate located within the State of New York? (Answer "yes" or "no") Yes.

If the answer is "yes" attach schedule of all interest in real estate, marked Schedule A, following the instructions for that schedule.

Schedule B—Stocks and Bonds:

7. Did the decedent at the time of death own any stocks and bonds? (Answer "yes" or "no") Yes.

If the answer is "yes" enter in schedule marked "B," a complete list of all the corporate stocks and bonds, including interest and dividends thereon, at the date of the decedent's death, together with the fair market value thereof, following the instructions for that schedule.

Schedule C—Mortgages, Notes, Cash and Insurance:

8. Did the decedent at the time of death own any mortgages, notes or cash? (Answer "yes" or "no") Yes.

9. Was any insurance on life of decedent receivable by his estate? (Answer "yes" or "no") No.

10. Was any insurance on life of decedent receivable by beneficiaries other than the estate? (Answer "yes" or "no") No.

If an answer is "yes" submit Schedule C, following instructions for that schedule.

Schedule D-1—Jointly Owned Property:

11. Did the decedent at the time of death own jointly with any person or persons real estate located in New York State [fol. 28] or personal property wheresoever located other than tangible personal property having an actual situs outside of New York State. (Answer "yes" or "no") No.

If the answer is "yes" enter in Schedule marked "D-1" a complete list of all jointly-owned property, following the instructions for that Schedule.

Schedule D-2—Other Miscellaneous Property:

12. Did the decedent at the time of death own any interest in a co-partnership or unincorporated business? (Answer "yes" or "no") No.

13. Did the decedent, at the time of death, own any miscellaneous property not returnable under any other schedule? (Answer "yes" or "no") Yes.

If an answer is "yes," attach a detailed statement of such other property marked "D-2," following the instructions for that schedule.

Schedule E—Transfers:

14. Did the decedent, at any time during life, make any transfer in contemplation of or intended to take effect in possession or enjoyment at or after death, other than by bona fide sale for an adequate and full consideration in money or money's worth? (Answer "yes" or "no") No.

15. Did the decedent, within two years immediately preceding death, make any transfer of a material part of his property without an adequate and full consideration in money or money's worth? (Answer "yes" or "no") No.

16. Did the decedent, at any time, make a transfer of a material part of his property without an adequate and full consideration in money or money's worth, but not believed to have been in contemplation of death or intended to take effect in possession or enjoyment at or after his death? (Answer "yes" or "no") No.

[fol. 29] 17. Did the decedent, at the time of death, possess the right (either alone or in conjunction with any person)

to change through the exercise of a power to alter, amend, or revoke the transfer of any property previously made by him? (Answer "yes" or "no") Yes.

18. Did the decedent, at any time during his life, relinquish in contemplation of death the power to alter, amend, or revoke any transfer previously made by him? (Answer "yes" or "no") No.

19. Were there in existence at the time of the decedent's death any trusts created by him during lifetime? (Answer "yes" or "no") Yes.

If any question is answered "yes," submit Schedule E, itemizing all such transfers in detail following the instructions for that schedule.

Schedule F—Powers of Appointment:

20. Did the decedent, at any time, by will or otherwise, transfer property by the exercise of a general or limited power of appointment? (Answer "yes" or "no") Yes.

If the answer is "yes," submit Schedule F, following the instructions for that schedule.

Schedule G-1—Property Identified as Previously Taxed:

21. Did the decedent at the date of death own any property (a) forming a part of the gross estate situated in the United States, of any person who died within five years of the date of death of the decedent, or (b) transferred to the decedent by gift within five years prior to his death where such property can be identified as having been received by the decedent from such donor by gift or from such prior decedent by gift, bequest, devise or inheritance or which [fol 30] can be identified as having been acquired in exchange for property so received? (Answer "yes" or "no") No.

If the answer is "yes," attach Schedule G-1, following the instructions for that schedule.

Deductions

Schedule G-2—Property Identified as Previously Taxed:

22. If property was listed in Schedule G-1, deduction should be taken in Schedule G-2 following the instructions for that schedule.

Schedule H—Funeral and Administration Expenses:

23. Itemize the funeral expenses and administration expenses in Schedule H following the instructions for that schedule.

Schedule I—Debts of Decedent:

24. Itemize the debts of the decedent in Schedule I, following the instructions for that schedule.

Schedule J—Mortgages, Net Losses, and Support of Dependents:

25. Itemize in Schedule J, any mortgages outstanding on property listed in Schedule A, losses through fire, storm, shipwreck or other casualty, or from theft sustained during administration, and expenses incurred in the support of dependents of the decedent, following the instructions for that schedule.

Schedule K—Charitable, Public, and Similar Gifts and Bequests:

26. Itemize in Schedule K, all devises and bequests to exempt corporations, following the instructions for that schedule.

[fol. 31] Schedule L—Beneficiaries:

27. Give in Schedule L, a statement of the names of all persons beneficially interested in the estate, the nature of their respective interests, etc., following the instructions for that schedule.

General Affidavit:

28. Deponent states that he has made diligent search for property of every kind left by the decedent; that he has carefully read the instructions printed on this form; that hereon is listed all the property, tangible and intangible, forming the gross estate of the decedent, so far as it has come to his knowledge and information; that he has carefully read all instructions under Schedule E of this form, and has made diligent and careful search for information as to whether the decedent during his life time made any transfers without a fair consideration in money or money's worth, and the answers given to the questions therein contained are true and

complete to the best of his knowledge, information and belief; that to the best of his knowledge, information and belief, the value shown for each item of property listed in this return was the fair market value of the same at the day of decedent's death, and that the debts, expenses and charges entered herein as deductions from the gross estate are correct and legally allowable.

Cornelius Vanderbilt.

Sworn to before me this 18th day of February, 1935.
Miriam C. West, Notary Public Kings County.
(Seal.)

[fol. 32] Schedule F—Powers of Appointment

Item No.		Description	Amount	Values as appraised in this proceeding
		Principal of fund held in trust by United States Trust Company of New York under Clauses Seventh and Eighth of the Will of Cornelius Vanderbilt, Deceased. Cornelius Vanderbilt, husband of the decedent, died testate September 12, 1899. His will, a copy of which is submitted herewith was admitted to probate by the Surrogate's Court of the County of New York on November 9, 1899. As appears by reference to said will, by the Seventh Clause thereof Mr. Vanderbilt bequeathed to the decedent, "the annual income or sum of Two hundred and fifty thousand dollars, . . . arising from securities to be selected" from his estate by his executors and to be set apart and held in trust by them during decedent's life; and by the Eighth Clause of his will at the death of the decedent he gave the principal of the fund to set apart to certain of their issue in such proportions and amounts as the decedent should direct or appoint in her last will and testament. By order of the Surrogate's Court of the County of New York made and entered on the 8th day of February, 1934, United States Trust Company of New York (whose office is at No. 45 Wall Street in the Borough of Manhattan in the City of New York) was appointed successor trustee of said fund. By the Third Article of her will, in the exercise of said power, the decedent appointed the principal of said fund to and among issue of said Cornelius Vanderbilt and the decedent designated by Clause Eighth of said will of said Cornelius Vanderbilt, as follows: $150,000 thereof to her daughter Gertrude Vanderbilt Whitney; $500,000 thereof in equal shares to William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt, sons of her son Alfred G. Vanderbilt; one third of the balance thereof in equal shares to Cathleen Vanderbilt Lowman and Gloria Laura Morgan Vanderbilt, daughters of her son Reginald C. Vanderbilt; and the remaining two-thirds of said balance to her daughter Countess Gladys Szechenyi. At the decedent's death the principal of said fund consisted of:		
1.	(1)	Cash	$1,260.20	
		Bonds		
	(2)	$195,000 par value Beach Creek Railroad Company, First Mortgage 4% Bonds, due July 1, 1936, interest payable January 1 and July 1, at 100, New York Stock Exchange	195,000.00	
[fol. 33]				
	(3)	$25,000 par value The Delaware & Hudson Company, First and Refunding Mortgage 4% Bonds, due May 1, 1943, interest payable May 1 and November 1, at 94-3/4, New York Stock Exchange	$23,687.50	

Schedule F—Powers of Appointment (Continued)

Item No.		Description	Amount	Values as appraised in this proceeding
(4)	101,000	par value Indiana Harbor Belt Railroad Company, General Mortgage 4% Bonds, due July 1, 1957, interest payable January 1 and July 1, at 92, Boston Stock Exchange	92,920.00	
(5)	51,000	par value Kalamazoo, Allegan & Grand Rapids Railroad Company, First Mortgage 5% Bonds, due July 1 1938, interest payable January 1 and July 1, at 103, New York Stock Exchange	52,530.00	
(6)	580,000	par value Morris & Essex Railroad Company, First Refunding Mortgage 3-1/2% Bonds, due December 1, 2000, interest payable June 1 and December 1, at 88-3/4, New York Stock Exchange	514,750.00	
(7)	58,000	par value The Michigan Central Railroad Company, Kalamazoo & South Haven Division, First Mortgage 5% Bonds, due November 1, 1939, interest payable May 1 and November 1, at 93	53,940.00	
(8)	36,000	par value New Jersey Junction Railroad Company, First Mortgage 4% Bonds, due February 1, 1986, interest payable February 1 and August 1, at 85-1/8, New York Stock Exchange	30,645.00	
(9)	970,000	par value New York Central & Hudson River Railroad Company, Michigan Central Collateral 3-1/2% Bonds, due February 1, 1998, interest payable February 1 and August 1, at 81-3/4, New York Stock Exchange	792,975.00	
(10)	1,114,000	par value New York Central Railroad Company, Consolidation 4% Bonds, Series "A", due February 1, 1998, interest payable February 1 and August 1, at 89-3/4, New York Stock Exchange	999,815.00	
(11)	1,774,000	par value New York Central & Hudson River Railroad Company, Mortgage 3-1/2% Bonds, due July 1, 1997, interest payable January 1 and July 1, at 86-3/8, New York Stock Exchange.	1,532,292.50	
[fol. 34]				
(12)	$78,000	par value New York Central & Hudson River Railroad Company, Refunding & Improvement 4-1/2% Bonds, Series "A", due October 1, 2013, interest payable April 1 and October 1, at 74-3/8, New York Stock Exchange	$58,012.50	
(13)	500	par value Northern Pacific Railway Company, Prior Lien Railway & Land Grant 4% Bonds due January 1, 1997, interest payable January 1, April 1, July 1 and October 1, at 94-3/4, New York Stock Exchange	473.75	
(14)	28,000	par value State of New York, 3-1/4% Bonds, due October 15, 1962, interest payable April 15 and October 15 at 102-3/8	28,645.00	— $28,665.00

Schedule F—Powers of Appointment (Continued)

Item No.		Description	Amount	Values as appraised in this proceeding
(15)	7,000	par value State of New York, 3-1/4% Bonds, due October 15, 1963, interest payable April 15 and October 15 at 102-3/8	7,166.25	
(16)	95,000	par value State of New York, 3-1/4% Bonds, due October 15, 1964, interest payable April 15 and October 15, at 102-1/2	97,375.00	
(17)	15,000	par value State of New York, 3-1/4% Bonds, due October 15, 1965, interest payable April 15 and October 15, at 102-1/2	15,375.00	
(18)	24,000	par value State of New York, 3-1/2% Bonds, due March 1, 1938, interest payable March 1 and September 1, at 104-3/4	25,140.00	
(19)	220,000	par value State of New York, 4% Bonds, due January 1, 1961, interest payable January 1 and July 1, at 114	250,800.00	
(20)	140,000	par value State of New York, 4% Bonds, due January 1, 1962, interest payable January 1 and July 1 at 114	159,600.00	
(21)	100,000	par value State of New York, 4% Bonds, due January 1, 1967, interest payable January 1 and July 1, at 114	114,000.00	
(22)	94,000	par value Union Pacific Railroad Company, Railroad & Land Grant First Mortgage 4% Bonds, due July 1, 1947, interest payable January 1 and July 1, at 104-1/8 New York Stock Exchange	97,877.50	
[fol. 35]				
(23)	$179,000	par value United States of America, First Liberty Loan, 3-1/2% Gold Bonds, due June 15, 1947, interest payable June 15 and December 15, at 103-22/32	$185,600.62	
(24)	195,000	par value West Shore Railroad Company, First Mortgage 4% bonds, due January 1, 2361, interest payable January 1 and July 1, at 82-5/8, New York Stock Exchange	161,118.75	
		Corporate Stock		
(25)	4/792	shares Beach Creek Railroad Company, Capital Stock, par value $50 per share, at 33-1/2, New York Stock Exchange	160,532.00	
(26)	2,724	shares The Pittsburgh & Lake Erie Railroad Company, Capital Stock, par value $50 per share, at 75-1/2, New York Curb Exchange	205,662.00	
(27)	3,632	shares Pullman, Inc., Capital Stock, no par value, at 58-5/8, New York Stock Exchange	212,926.00	
		Total	$6,070,119.57	$6,070,139.57

Said principal however being subject to trustee's commissions and the cost and expenses of the trustee's accounting, a detailed statement of which will be submitted hereafter.

Less atty's fees etc. as per supp. affd. 76,712.80

*$5,993,426.77

* An additional $57,854.70 was allowed for commissions for receiving principal and the appraiser's report as filed lists the total of the schedule at $5,935,572.07.

[fol. 36]

Schedule L

Beneficiaries

Names, Addresses, and, where required, ages	Relationship to decedent	Interests in Estate	Value
1. Cornelius Vanderbilt, 640 Fifth Avenue, New York City, N. Y. Age 61	Son	Income of residuary estate for life	Unknown
2. Gertrude Vanderbilt Whitney, 871 Fifth Avenue, New York City, N. Y.	Daughter	Contingent remainder interest in residuary estate	Unknown
3. Countess Gladys Szechenyi, 35 Eton Place, London, England.	Daughter	(a) Real Estate 1 East 67th Street, Borough of Manhattan, City and State of New York	$250,000
		(b) Contingent remainder interest in residuary estate	Unknown
4. Cornelius Vanderbilt, Jr., Reno, Nevada.	Grandson	Remainder interest in one-half residuary estate	Unknown
5. Grace Vanderbilt Davis, 4 East 72nd Street, New York City, N. Y.	Granddaughter	Remainder interest in one-half residuary estate	Unknown
6. Cornelia Vanderbilt Davis, 4 East 72nd Street, New York City, N. Y. Age 5.	Great Granddaughter	Contingent remainder interest in residuary estate	Unknown
7. Flora Whitney Miller, Old Westbury, Long Island, N. Y.	Granddaughter	Contingent remainder interest in residuary estate	Unknown
8. Pamela Tower, Old Westbury, Long Island, N. Y. Age 12.	Great Granddaughter	Contingent remainder interest in residuary estate	Unknown
9. Whitney Tower, Old Westbury, Long Island, N. Y. Age 10.	Great-Grandson	Contingent remainder interest in residuary estate	Unknown
10. Flora MacCulloch Miller, Old Westbury, Long Island, N. Y. Age 5.	Great Granddaughter	Contingent remainder interest in residuary estate	Unknown
11. Leverett Miller, Old Westbury, Long Island, N. Y. Age 2.	Great Grandson	Contingent remainder interest in residuary estate	Unknown
12. Cornelius Vanderbilt Whitney, Old Westbury, Long Island, N. Y.	Grandson	(a) Specific bequest of portrait	$150.00
		(b) Contingent remainder interest in residuary estate	Unknown
[fol. 37]			
13. Harry Payne Whitney, 2d, Old Westbury, Long Island, N. Y Age 10.	Great Grandson	Contingent remainder interest in residuary estate	Unknown
14. Marie Nancy Whitney, Old Westbury, Long Island, N. Y. Age 7.	Great Granddaughter	Contingent remainder interest in residuary estate	Unknown

Schedule L—Continued

Beneficiaries

Names, Addresses, and, where required, ages	Relationship to decedent	Interests in Estate	Value
15. Barbara Whitney Henry, Old Westbury, Long Island, N. Y.	Granddaughter	Contingent remainder interest in residuary estate	Unknown
16. Gertrude Whitney Henry, Old Westbury, Long Island, N. Y. Age 9.	Great Granddaughter	Contingent remainder interest in residuary estate	Unknown
17. William Barklie Henry, Old Westbury, Long Island, N. Y. Age 6.	Great Grandson	Contingent remainder interest in residuary estate	Unknown
18. Cornelia S. Roberts, 1901-23rd Street, Washington, D. C.	Granddaughter	(a) Undivided interest in specific bequest of portrait of her mother	$200.00
		(b) Contingent remainder interest in residuary estate	Unknown
19. Gladys Roberts, 1901-23rd Street, Washington, D. C Born after death of decedent.	Great Granddaughter	Contingent remainder interest in residuary estate	Unknown
20. Countess Alice Hadik (named in will as Countess Alice Szechenyi), Seregelyes, Fejer, M. Hungary.	Granddaughter	(a) Undivided interest in specific bequest of portrait of her mother	$200.00
		(b) Legacy	50,000.00
		(c) Contingent remainder interest in residuary estate	Unknown
21. Laszlo Hadik Seregelyes, Fejer M. Hungary. Age 2.	Great Grandson	Contingent remainder interest in residuary estate	Unknown
22. Bela Hadik Seregelyes, Fejer M, Hungary Age 1.	Great Grandson	Contingent remainder interest in residuary estate	Unknown
23. Gladys Szechenyi, 35 Eton Place, London, England. Age 20.	Granddaughter	(a) Undivided interest in specific bequest of portrait of her mother	$200.00
[fol. 38]		(b) Contingent remainder interest in residuary estate	Unknown
24. Sylvia Szechenyi, 35 Eton Place, London, England. Age 15.	Granddaughter	(a) Undivided interest in specific bequest of portrait of her mother	$200.00
		(b) Contingent remainder interest in residuary estate	Unknown
25. Nandine Szechenyi, 35 Eton Place, London, England. Age 11.	Granddaughter	(a) Undivided interest in specific bequest of portrait of her mother	$200.00
		(b) Contingent remainder interest in residuary estate	Unknown
26. William H. Vanderbilt, Oakland Farm, Portsmouth, R. I.	Grandson	Contingent remainder interest in residuary estate	Unknown
27. Emily Vanderbilt Oakland Farm, Portsmouth. R. I. Age 8.	Great Granddaughter	Contingent remainder interest in residuary estate	Unknown

Schedule L—Continued

Beneficiaries

Names, Addresses, and, where required, ages	Relationship to decedent	Interests in Estate	Value
28. Ellen French Vanderbilt, Oakland Farm, Portsmouth, R. I. Age 3.	Great Grand-daughter	Contingent remainder interest in residuary estate.....	Unknown
29. Anne Colby Vanderbilt, Oakland Farm, Portsmouth, R. I. Age 3.	Great Grand-daughter	Contingent remainder interest in residuary estate.....	Unknown
30. Alfred G. Vanderbilt, Banyan Road, Palm Beach, Florida.	Grandson	(a) Specific bequest of portrait..	$250.00
		(b) Contingent remainder interest in residuary estate.....	Unknown
31. George Vanderbilt, Banyan Road, Palm Beach, Florida. Age 19.	Grandson	Contingent remainder interest in residuary estate.....	Unknown
32. Cathleen Vanderbilt Lowman, Longridge and Riverbank Roads, Stamford, Conn.	Grand-daughter	(a) Undivided interest in specific bequest of portrait of her father.....	$125.00
		(b) Contingent remainder interest in residuary estate.....	Unknown
33. Harry Cooke Cushing, 4th, 125 East 63rd Street, New York City, N. Y. Age 11.	Great Grandson	Contingent remainder interest in residuary estate.....	Unknown
34. Gloria Laura Morgan Vanderbilt, Old Westbury, Nassau County, N. Y. Age 10.	Grand-daughter	(a) Undivided interest in specific bequest of portrait of her father.....	$125.00
		(b) Contingent remainder interest in residuary estate.....	Unknown
[fol. 39]			
35. Count Laszlo Szechenyi, 35 Eton Place, London, England.	Son-in-law	Legacy.....	100,000.00
36. Gloria Morgan Vanderbilt, 49 East 72nd Street, New York City, N. Y.	Daughter-in-law	Legacy.....	$100,000.00
37. William E. Shepherd, 21 East 82nd Street, New York City, N. Y.	Nephew	Legacy.....	50,000.00
38. Maude Gwynne Harrah, Mt. Kisco, Westchester County, New York.	Niece	Legacy.....	100,000.00
(said William E. Shepherd and Maude Gwynne Harrah are children of Cettie G. Shepherd, a sister of decedent who predeceased her.)			
39. Alice Vanderbilt Morris, 415 Lexington Avenue, New York City, N. Y.	No relation	Legacy.....	50,000.00
40. William Annett, 53 East 79th Street, New York City, N. Y.	No relation	Legacy.....	500.00

Schedule L—Continued

Beneficiaries

Names, Addresses, and, where required, ages	Relationship to decedent	Interests in Estate	Value
41. Thomas Clancy, 24 East 72nd Street, New York City, N. Y.	No relation	Legacy	500.00
42. Alma Petersen, 993 Fifth Avenue, New York City, N. Y.	No relation	Legacy	500.00
43. Elsa Anderson 993 Fifth Avenue, New York City, N. Y.	No relation	Legacy	$500.00
44. William Crane, as Executor under the will of Mary Crane, deceased, 796 Fairmount Place, Bronx, New York.	No relation	Legacy	3,000.00
45. Teresa Turner, 304 Broadway, Newport, R. I.	No relation	Legacy	1,000.00
46. Margaret MacNamara, 6111-64th Street, Maspeth, L. I.	No relation	Legacy	1,000.00
[fol. 40]			
47. Sheila Sheehan (formerly known as Sheila Sweeney), West End, Rathmore, County Kerry, Ireland.	No relation	Legacy	1,000.00
48. John Fenton, 20 East 65th Street, New York City, N. Y.	No relation	Legacy	500.00
49. John Cunningham, 1 East 67th Street, New York City, N. Y.	No relation	Legacy	4,000.00
50. Augustus Tebbit, The Breakers, Newport, R. I.	No relation	Legacy	1,000.00
51. Cornelius Riley, The Breakers, Newport, R. I.	No relation	Legacy	500.00
52. John Harrington, The Breakers, Newport, R. I.	No relation	Legacy	$1,000.00
53. William Murphy, Coggeshall Avenue, Newport, R. I.	No relation	Legacy	2,000.00
54. Joseph Sylvester, 5 Potter Street, Newport, R. I.	No relation	Legacy	1,000.00
55. William Neilson, 5 Conrad Court, Newport, R. I.	No relation	Legacy	2,000.00
56. John Brady, 22 Newport Avenue, Newport, R. I.	No relation	Legacy	1,000.00
57. Charles Knittel, 2726 Valentine Avenue, New York City, N. Y.	No relation	Legacy	1,000.00
58. John Gallagher, 341 East 85th Street, New York City, N. Y.	No relation	Legacy	Amount Unknown
59. John Mitchell, 1 East 67th Street, New York City, N. Y.	No relation	Legacy	6,000.00

Schedule L—Continued

Beneficiaries

	Names, Addresses, and, where required, ages	Relationship to decedent	Interests in Estate	Value
60.	Society of St. Johnland, Kings Park, Long Island, New York.	No relation	Legacy	50,000.00
61.	The Newport Hospital, Newport, Rhode Island.	No relation	Legacy	$60,000.00
[fol. 41]				
62.	St. Bartholomew's Church, 109 East 56th Street, New York City, N. Y.	No relation	Legacy	50,000.00
63.	Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Trustees of the trust created by the Fourteenth Clause of the Will, 230 Park Avenue, New York City, N. Y.			
64.	George W. Wickersham and Thomas B. Gilchrist, as General Guardians of the estate of Gloria Laura Morgan Vanderbilt, Infant, 14 Wall Street, New York City, N. Y.			
65.	Harry Payne Whitney legatee named in Tenth Clause of Will, predeceased the decedent.			
66.	Guaranty Trust Company of New York, as assignee of legacy to Gloria Morgan Vanderbilt under the Eleventh Clause of the Will, 5th Avenue at 44th Street, New York City, N. Y.			
67.	United States Trust Company of New York (named as Executor and Trustee upon certain contingencies), 45 Wall Street, New York City, N. Y.			

The following are the names of the appointees of the principal of the trust fund over which the decedent had the power of appointment, as set out in Schedule F hereof, all of whose relationship and whose post-office addresses have been listed above:

Name	Relationship	Amount
Gertrude Vanderbilt Whitney,	Daughter	$150,000.00
William H. Vanderbilt,	Grandson	166,666.67
Alfred G. Vanderbilt,	Grandson	166,666.67
George Vanderbilt,	Grandson	166,666.66
Cathleen Vanderbilt Lowman,	Granddaughter	One-sixth balance of said fund.
Gloria Laura Morgan Vanderbilt,	Granddaughter	One-sixth balance of said fund.
Countess Gladys Szechenyi	Daughter	Two-thirds balance of said fund.

[fol. 42] LAST WILL AND TESTAMENT OF ALICE G. VANDERBILT

I, Alice G. Vanderbilt, of the City of New York, do make, publish and declare this my Last Will and Testament as follows:

First. I give and bequeath the portrait of my husband, the late Cornelius Vanderbilt, painted by Porter in the year 1900, to my grandson Cornelius Vanderbilt Whitney.

I give and bequeath the portrait of my son Alfred G. Vanderbilt by Charles Hall to my grandson Alfred G. Vanderbilt.

I give and bequeath each portrait of any one of my children other than my son Alfred G. to the child or children of the individual of whom it is a portrait.

Second. Exercising the power of appointment conferred upon me by the Fourth Clause of my husband's will, I designate and appoint my daughter the Countess Gladys Szechenyi (referred to in said will as Gladys Moore Vanderbilt), if she survives me, to take and receive, and I give, devise and bequeath to her, the residence and all the land and property at Newport, Rhode Island, owned by my husband at the time of his death and devised by said Fourth Clause of his said will, and also all the furniture, pictures, silver, musical instruments and works of art and all articles useful and ornamental, in or appurtenant to said Newport residence, bequeathed by the Fourth Clause of said will, including also as part of said property all the lands, with the stables and buildings thereon, on Coggeshall Avenue at Newport, owned by my husband at the time of his death, with equipment and furniture thereof, being all the [fol. 43] real and personal property described in said Fourth Clause of my husband's will.

In the event that my daughter the Countess Gladys Szechenyi does not survive me, then I designate and appoint my daughter Gertrude Vanderbilt Whitney to take and receive, and I give, devise and bequeath to her, the real and personal property described in and devised and bequeathed by said Fourth Clause of my husband's will.

Third. Exercising the power of appointment conferred upon me by the Eighth Clause of my husband's will over and in respect to the principal of the fund set apart under the Seventh Clause thereof to create the annual payment of Two hundred and fifty thousand dollars to me during my life, I give, bequeath and appoint the same as follows:

(a) One hundred and fifty thousand dollars ($150,000) thereof to my daughter Gertrude Vanderbilt Whitney, and

(b) Five hundred thousand dollars ($500,000) thereof to the issue of my deceased son Alfred G. Vanderbilt, surviving me, in equal shares per stirpes and not per capita;

I make said appointments as a token of my affection for the appointees, having in mind that each of them is otherwise amply provided for;

(c) One-third (⅓) of the balance of the principal of said fund, after the deduction from said principal of the sums above specified, to the issue of my deceased son Reginald C. Vanderbilt, surviving me, in equal shares per stirpes and not per capita, and

[fol. 44] (d) The remaining two-thirds (⅔) of said balance of the principal of said fund to my daughter Countess Gladys Szechenyi;

If either of my said daughters does not survive me I give, bequeath and appoint the share of said principal appointed to her as aforesaid to her issue, surviving me, in equal shares per stirpes and not per capita.

Fourth. All my right, title and interest in and to all that certain building at the northeast corner of Sixth and Main Streets in the City of Cincinnati, County of Hamilton and State of Ohio, known as the Gwynne Building, and the entire plot or parcel of land constituting the site of said building or used in connection therewith, subject, however to the existing lease thereof to The Proctor & Gamble Company and the option to purchase given to the lessee in and by said lease, together with all my right to receive the rental reserved in and by said lease and the agreed purchase price in the event of the exercise of said option, I give, devise and bequeath to my son General Cornelius Vanderbilt absolutely.

Fifth: I give, devise and bequeath to my daughter the Countess Gladys Szechenyi absolutely all that certain plot or parcel of land at the northeasterly corner of Fifth Avenue and 67th Street in the Borough of Manhattan City, County and State of New York, described in and conveyed by deed of Harry Payne Whitney and wife to me, dated July 9th, 1925 and recorded in the Office of the Register

of the County of New York in Liber 3492 of Conveyances at page 230, together with the dwelling-house thereon erected and known at the date hereof by the street number 1 East 67th Street in said Borough and City, and also all [fol. 45] the furniture, furnishings and equipment of said dwelling-house at the time of my decease except articles otherwise specifically bequeathed by this my will or a codicil thereto.

Sixth. I give and bequeath—

To the Society of St. Johnland, Kings Park, Long Island, New York, for the work of Sunbeam Cottage, the sum of Fifty thousand dollars ($50,000);

To the Newport Hospital, at Newport, Rhode Island, the sum of Eighty thousand dollars ($80,000), the income from which to be applied to the support of the Cornelius Vanderbilt Pavilion; and

To St. Bartholomew's Church in the City of New York the sum of Fifty thousand dollars ($50,000).

Seventh. I give and bequeath to my sister Cettie Gwynne Shepherd, the sum of One hundred thousand dollars ($100,000), and to her daughter Maude Gwynne Harrah the sum of Fifty thousand dollars ($50,000).

Eighth. I give and bequeath to my granddaughter and namesake the Countess Alice Szechenyi the sum of Fifty thousand dollars ($50,000).

Ninth. I give and bequeath to Alice Vanderbilt Morris, wife of D. H. Morris, the sum of Fifty thousand dollars ($50,000).

Tenth. I give and bequeath to each of my sons-in-law, Harry Payne Whitney and Count Laszlo Szechenyi, as a mark of esteem and affection, the sum of One hundred thousand dollars ($100,000).

[fol. 46] Eleventh. I give and bequeath to Gloria Morgan Vanderbilt, widow of my son Reginald C. Vanderbilt, the sum of One hundred thousand dollars ($100,000).

Twelfth. To each servant who at the time of my decease is, and for more than five years has been, in my employ I give and bequeath a sum equivalent to One thousand dollars ($1,000) for each five years of his or her continuous employment by me; to each servant who at the time of my

decease is, and for more than three years but not for more than five years has been continuously, in my employ I give and bequeath the sum of Five hundred dollars ($500).

Thirteenth. I direct that the Executrices and Executors of this my will, hereinafter named, pay out of my estate any and every inheritance, transfer or legacy tax chargable upon or on account of any gift, devise or bequest contained in, or any right of transfer or inheritance arising under, this my will or any codicil thereto under any law of the United States, the State of New York, the State of Ohio or any other State or country, excepting and excluding, however, all property, devised or bequeathed to me by the will of my husband in respect to which I have exercised a power of appointment or of testamentary disposition given to me by said will.

Fourteenth. All the rest, residue and remainder of all the property and estate, real and personal, of whatsoever character and wheresoever situated, of which I die seized or possessed or to which I am in any way entitled at the time of my decease, and any part of my estate that has not been effectually devised or bequeathed, I give, devise and be-
[fol. 47] queath to the Executrices and Executors of this my will, hereinafter named, in trust to hold and invest, and from time to time to reinvest and keep invested, the principal thereof, to collect and receive the income from said principal and, after paying from said income all proper expense of administering said trust and all taxes and other charges properly payable by them therefrom, to pay the balance of said income quarterly in each year to my son, General Cornelius Vanderbilt, if he survives me, during and throughout his life, and at his death to assign, transfer and deliver the principal of said trust to, or for the benefit of, his issue in such shares and in such manner, in trust or otherwise, as he shall by his Will, duly admitted to probate, direct and appoint, or, in default of such appointment, to assign, transfer and deliver said principal to and among his surviving issue in equal shares per stirpes and not per capita or, in default of such issue, to and among my issue then surviving in equal shares per stirpes and not per capita.

If my son Cornelius does not survive me but leaves issue surviving me then I direct that said residuary estate be

divided into as many equal shares as shall be required for the following purposes, and that one such share be held in in trust as aforesaid for, and the net income therefrom be paid quarterly in each year to, each child of my said son that survives me during and throughout his or her life and upon his or her death the principal of said share be assigned, transferred and delivered to and among his or her surviving issue in equal shares per stirpes and not per capita, and further that one such share be divided into as many equal parts as there are surviving me children of a deceased child of my said son, and one such part be held in trust as afore- [fol. 48] said for, and the net income therefrom be paid quarterly in each year to, each such surviving child of a deceased child of my said son during and throughout his or her life and upon his or her death the principal of said trust so held for him or her be assigned, transferred and delivered to and among his or her surviving issue in equal shares per stirpes and not per capita; if any one of said life beneficiaries shall leave no issue him or her surviving then and in that event the share or part of said residuary estate held in trust for him or her as aforesaid shall at his or her death be assigned, transferred and delivered to and among the then surviving issue of my son Cornelius in equal shares per stirpes and not per capita, or in default of any such issue to my issue, then surviving, in equal shares per stirpes and not per capita.

Fifteenth. I nominate and appoint my daughters Gertrude Vanderbilt Whitney and Countess Gladys Szechenyi Executrices, and my son General Cornelius Vanderbilt, my son-in-law Harry Payne Whitney, and Frederick L. Merriam, Executors, of this my Will, and Trustees of each trust created or provided for in and by the Fourteenth Clause hereof, each of the four first named to serve as Executrix or Executor and also as Trustee, however, without commissions or other compensation, and her or his acceptance of said appointment to be deemed a waiver of all such compensation. I direct that no bond shall be required of any of the individuals above nominated to qualify her or him to act as such Executrix or Executor or as such Trustee in the State of New York or elsewhere; nor shall any inventory, list or accounting be required of or from said Executrices and Execu- [fol. 49] tors and they are hereby fully released from such inventory, list and accounting.

Sixteenth. I hereby give to said Executrices and Executors of this my Will, as such and also as Trustees of each trust created or provided for in and by this my Will, or to such one or more of them as shall qualify and be at any time serving as such, full power and authority at their, her or his absolute discretion to sell, at public or private sale, at such times and places, in such manner and upon such terms, as they, she or he in their, her or his discretion shall deem advisable, or in their, her or his discretion to lease, or modify an existing lease of, or otherwise dispose of, in such manner, for such periods and upon such terms as they, she or he shall deem advisable, any and all real estate in the State of New York or in the State of Ohio or elsewhere, and any and all personal property, constituting a part of my estate or the principal or part of the principal of such trust; also to mortgage or pledge said real or personal property or any part thereof but only for the purpose of providing funds for the payment of taxes or for the maintenance or improvement of property constituting part of my estate or the principal or part of the principal of such trust, the mortgagee or pledgee, however, to be under no obligation or liability to see to the application of such funds; and as Executrices and Executors or as Trustees as aforesaid to execute and deliver any and all deeds, leases, bonds, mortgages and other instruments appropriate to the exercise of said powers.

I hereby authorize and empower the Trustees of each trust created or provided for in and by this my Will, the survivors and survivor of them, to retain, or in their, her or [fol. 50] his discretion to sell at public or private sale, at such time or times, on such terms and at such prices as they, she or he shall deem advantageous, any or all of the bonds, stocks or other securities owned by me at the time of my decease that shall become the principal or a part of the principal of said trust, and to invest the proceeds of each such sale and any other part of the principal of said trust in any stocks, bonds or other securities, or in any other properties, including real estate, that they, she or he shall deem it desirable or expedient to purchase or invest in for said trust, whether or not such investment in any instance be of the class or kind commonly regarded as a legal investment for trust funds; and I direct that said Trustees, or any of them, shall not be held accountable for any depreciation that may occur in the value of, or any loss resulting from, any such investment. Said Trustees may, but shall not in

any event be required to, create, maintain or set apart from income any reserve or sinking fund to meet diminishing premiums or to offset depreciation in any investment hereby authorized.

Seventeenth. I hereby further authorize and empower the Trustees of each trust created or provided for in and by this my Will, the survivors and survivor of them, at any time in their, her or his discretion, to convey, assign, transfer and deliver the principal and undistributed income of such trust to the United States Trust Company of New York as substituted Trustee thereof, with all the powers, including all discretionary powers, hereby given to and conferred upon them, or upon her or him, upon such terms as shall be agreed upon between said Trustees or Trustee and said Trust Company, [fol. 51] and upon such transfer of said principal and income to said Trust Company and its acceptance of the trust, the said individual Trustees or Trustee shall be fully released and discharged from all further duty, responsibility and obligation with respect to the money and securities so transferred and the further administration of said trust.

Eighteenth. If both the Executrices and all the Executors hereinabove named shall fail to qualify or if at any time before completion of the administration of my estate it shall happen in any way or from any cause that there is living, able and willing to serve no one of said Executrices or Executors, then and in such event I nominate and appoint the United States Trust Company of New York Executor of this my will; and if all the persons hereinabove named as Trustees of the trust or trusts created or provided for in and by the foregoing Fourteenth Clause hereof shall fail to qualify or shall die or become in any way incompetent to serve, then I nominate and appoint said Trust Company sole Trustee of said trusts or of such of them as shall not have been fully administered and shall be thus without Trustees or a Trustee competent and willing to serve. And I give to said United States Trust Company of New York as such Executor and as such Trustee all powers, including all discretionary powers, which I have hereby given to and conferred upon said Executrices and Executors as such and as Trustees as aforesaid.

Nineteenth. I hereby expressly revoke and annul all other wills and codicils by me at any time heretofore made.

[fol. 52] In Witness Whereof, I have to this my Last Will and Testament subscribed my name and affixed my seal this Eighth day of June in the year One thousand, nine hundred and twenty-eight.

Alice G. Vanderbilt (L. S.)

Subscribed, sealed, published and declared by the said Alice G. Vanderbilt, the Testatrix, as, for and to be her Last Will and Testament, in the presence of us and of each of us, who, at her request, in her presence and in the presence of each other, have hereunto subscribed our names as witnesses thereunto this 8th day of June, One thousand nine hundred and twenty-eight. Henry B. Anderson, Sands Point, N. Y. Emery L. Ferris, 1 Richbell Road, Scarsdale, N. Y. William C. Whittemore, 11 Virginia Place, Larchmont, N. Y.

LAST WILL AND TESTAMENT OF CORNELIUS VANDERBILT

I, Cornelius Vanderbilt, of the City of New York, do make, publish and declare this my last Will and Testament, as follows:

First. I give and devise to my beloved wife Alice G. Vanderbilt, for and during the term of her natural life, my dwelling house on Fifth Avenue and Fifty-seventh and Fifty-eighth Streets in the City of New York, with the full lots upon which the said house stands, bounded and described and containing as follows to wit:

[fol. 53] Beginning at the northwest corner of Fifty-seventh Street and Fifth Avenue; running thence westerly along Fifty-seventh Street, one hundred and twenty-five feet; thence northerly, at right angles with Fifty-seventh Street, to the centre line of the block; thence westerly, along said centre line ten feet; thence northerly to Fifty-eighth Street; thence easterly along Fifty-eighth Street one hundred and thirty-five feet to Fifth Avenue; thence southerly along Fifth Avenue to the place of beginning. Also I give and devise to her two lots known by the Street numbers Forty-two and Forty-four East Fifty-eighth Street, whereon my stable now stands, for the term of her natural life. Also I give to my wife all the household furniture, pictures,

silver, musical instruments and works of art, and all other articles, useful or ornamental, which may be in or appurtenant to my residence in New York at the time of my decease, with power during her life to change or dispose of any of my household furniture or other chattels.

I except from this bequest the portrait and bust of my grandfather, and the portrait of my father left to me by my father, and the two portraits bequeathed to me in the Will of my grandfather, all of which I give to my son Alfred G.; the portrait of my father and grandfather, which I bequeath to my son Reginald C.; two portraits of myself, which I bequeath, one to each of my daughters Gertrude and Gladys Moore, to be selected for that purpose by my wife, and my several pearl pins which I bequeath to my two daughters Gertrude and Gladys Moore. All the rest of my personal jewelry, with my watches, I give to my wife Alice G. She knows my views in respect thereof, and in her judgment I have entire confidence.

[fol. 54] Second. At the death of my wife, I give, devise and bequeath the said above described property so devised to her for her natural life, to such one of my sons Alfred G. or Reginald C., if they or either of them survive her, as she may nominate or appoint for that purpose in her last Will and Testament, and in default of such appointment, I devise the same to the eldest of my said sons Alfred G. or Reginald C., who shall be living at the time of the death of my wife, to have and to hold the same to such son, his heirs and assigns forever.

If neither of my said two sons shall be living at the death of my wife, I give and devise the said property to the eldest of my daughters then living, her heirs and assigns forever. If neither of my said sons or daughters shall be then living, I direct that the said property so devised to my wife for life shall be sold by my Executors, or the survivors or survivor of them and the proceeds thereof divided among the then living children of my daughter Gertrude, my son Alfred G., my son Reginald C. and my daughter Gladys Moore, and in default of such grandchildren, the said property shall become and be part of my residuary estate.

Third. I also give to my wife my pew in Trinity Church, Newport, Rhode Island, and my pew Number Twenty in St. Bartholomew's Church in the City of New York, to have and to hold the same to her, her heirs and assigns forever.

I also give and bequeath to my said wife all horses, vehicles, harness, equipments and stable furniture of every description, which may at the time of my death be in my stables, or usually kept there.

[fol. 55] I except from these, of course, such horses, vehicles, harness and equipments as I have in my life-time given to my children, or either of them, such gifts being hereby confirmed.

I give to my wife my box in the Metropolitan Opera House as her sole property.

Fourth. I also give, devise and bequeath to my beloved wife Alice G. my residence and all the land and property which I own, or at the time of my death may own, in Newport, Rhode Island, not herein specifically devised, with all the furniture, pictures, silver, musical instruments and works of art not otherwise specifically bequeathed, and all articles, useful or ornamental, which may at that time be in or appurtenant to my said Newport residence; and also all my lands, with the stables and buildings thereon, on Coggeshall Avenue, Newport, with the equipment and furniture thereof, to have and to hold the same during the term of her natural life, and upon her death I give, devise and bequeath the same, in fee, to such one of my children, Alfred G., Reginald C., Gertrude and Gladys Moore, as she may designate for that purpose by her last Will and Testament; and in default of such designation the same shall become and be part of my residuary estate.

Fifth. My Oakland farm in South Portsmouth, Rhode Island, with all the buildings, furniture, equipments and appurtenances, together with all live stock or animals upon it, as the same shall be at the time of my death, I give and devise to my son Alfred G., to have and to hold, to him, his heirs and assigns forever; excepting, of course, any horses, vehicles, harness and equipments which I have previously given to my other children.

[fol. 56] Sixth. I also give and bequeath to my said wife absolutely, securities aggregating at their market value Two millions of dollars, to be selected by my Executors out of my estate, or in place thereof, should my wife so elect, Two million dollars in money.

Seventh. I also give and bequeath to my said wife the annual income or sum of Two hundred and Fifty thousand

dollars, payable to her quarterly, to be computed from the date of my death, and arising from securities to be selected from my estate and set apart by my Executors, and which I give to them to be held in trust for that purpose. If any such securities should be paid off during the continuance of this trust, the amount received therefrom shall be re-invested in similar railroad or other securities to be held by said trustees in place of the securities so paid off.

Eighth. At the death of my wife the principal set apart under the Seventh Clause of my Will to create the annual payment of Two hundred and Fifty thousand dollars to my wife, shall be given to our children, Gertrude, Alfred G., Reginald C. and Gladys Moore; and if any then be dead, to their issue, in such proportions and amounts as my said wife may direct or appoint in her last Will and Testament, and in default of such appointment the same shall be divided among our said four children equally, share and share alike, the issue of any such child or children to take its parent's share, per stirpes and not per capita. Any child born to us after my death shall be entitled to share in this division, and in case of the death of either of said children, without issue, the share of such child is to go to the survivors of such children in equal shares.

[fol. 57] Ninth. Exercising the power therein given, I direct that my share in the trust of Five million dollars, which is now held in trust for me under the Seventh Clause of my father's will, be at my death paid, Five hundred thousand dollars to my son Cornelius, and the balance of the principal of said trust of Five million dollars be equally divided among my other children, share and share alike, the issue of any deceased child to take its parent's share, per stirpes and not per capita.

Tenth. I give and bequeath to my Executors, hereinafter named, One million dollars in securities held by me at the time of my death, to be chosen and taken at their market value by my Executors for that purpose, and held by them in trust to the use of my son Cornelius, to collect and receive the income thereof and to pay the net income as collected to my said son Cornelius from my death during the term of his natural life, and upon his death to divide said principal into as many shares as my son Cornelius shall leave children him surviving, and to hold one of such shares

to the use of each such child during the term of the natural life of the youngest child of my son Cornelius who may be living at the time of my death, appropriating so much of the income thereof as such Trustees may deem desirable to the support, maintenance and education of the several children respectively, and accumulating any surplus for his or her benefit during his or her minority, if the trust shall so long exist, and on his or her arriving at majority to pay all accumulations of income to such child. On the death of the youngest child of my son Cornelius, who shall be living at the time of my death, the principal of such fund shall be [fol. 58] paid over to the child for whose use the same shall be held respectively; but if my son Cornelius should die leaving no issue him surviving, then at his death the principal so set apart for his benefit shall become and be part of my residuary estate; and if either of his children should survive him and die before attaining majority, and without issue, the principal set apart for such child shall become part of my residuary estate.

I direct that no payment be made in anticipation of such income and that no part of either of such trust funds be paid over or alienated during the life of the person entitled to the income therefrom.

Eleventh: I give and bequeath to my said Executors, the survivors and survivor of them, Twenty million dollars in securities held by me at the time of my death, to be selected out of my estate and set apart at their market value by my said Executors, the survivors and survivor of them, who shall divide the same into four parcels or shares, each one of said parcels so set apart to contain, in their judgment, as nearly as may be an equal amount of each kind of securities, and shall hold one of said parcels in trust for the use of my daughter Gertrude, one for my son Alfred G., one for my son Reginald C. and one for my daughter Gladys Moore, and shall collect and receive the income from such separate parcels, and pay the same as collected to the son or daughter for whom it is set apart, during the natural life of such sons or daughters. I direct that no payment be made in anticipation of such income and that no part of said trust fund be paid over or alienated during the life-time of the person entitled to the income thereof, and upon the death of the beneficiary of such trust, I direct that such [fol. 59] principal be paid to his or her lawful issue in such

share or proportion as such beneficiary may by his or her last Will and Testament appoint, and in default of such testamentary appointment I direct that such parcel be divided into equal shares among the children of such beneficiary, per stirpes and not per capita; and in default of such issue, to be paid to the survivors of my children Gertrude, Alfred G., Reginald C. and Gladys Moore, in equal shares; and if either of them be dead, leaving issue then living, such issue shall take in equal shares the share the parent would have taken if living.

Twelfth. I authorize the trustees of the several trust funds, created under this my Will, to receive and re-invest the moneys or proceeds of stocks and bonds constituting such trust funds as they mature, and if they think best to sell any of the same, to make sales thereof, and I authorize them to hold such funds and securities and, from time to time, in their discretion, to change the investments of such trust funds, and I direct that they shall at all times keep the same invested in stocks and bonds of the United States or of the State of New York, or the mortgage bonds of the New York Central and Hudson River Railroad Company; the Lake Shore and Michigan Southern Railroad Company; the Michigan Central Railroad Company; the New York and Harlem Railroad Company and the Chicago and North Western Railway Company, or in bonds guaranteed by some one or more of the said Railroad Companies; also in bonds secured by mortgage on improved real estate in the City of New York; and I expressly authorize them to invest any of said trust funds in the mortgage bonds of any railroad company which may be approved for that purpose by all of my Executors who may qualify.

[fol. 60] I direct that all of the securities in which trust funds may from time to time be invested, be taken and held by my said trustees in their names, as trustees, for the parties respectively for whose benefit the certain funds are severally set apart and held, so that each of said trust funds may be kept separate and distinct from all others, and that the accounts thereof may be separately kept.

Thirteenth: I give to my mother, as a mark of affection, One hundred thousand dollars, and I give to my brother William K. Vanderbilt One hundred thousand dollars.

I give and bequeath to my friend Chauncey M. Depew Two hundred thousand dollars.

I give and bequeath to Edward V. W. Rossiter, Fifty thousand dollars.

To John Hone, Fifty thousand dollars.

To the Reverend Dr. David H. Greer, Fifty thousand dollars.

To Charles C. Clarke, Twenty-five thousand dollars.

To Franklin Allen, Twenty-five thousand dollars.

To Maud Gwynne Shepard, Twenty-five thousand dollars.

To John Rutgers Leroy, Twenty thousand dollars.

To Charles F. Cox, Ten thousand dollars.

To Edgar T. Chapman, son of Reverend E. T. Chapman, of Watervliet, New York, Ten thousand dollars.

To George R. Fearing, Ten thousand dollars.

To Reverend Dr. William S. Langford, Ten thousand dollars.

To George A. Warburton, Ten thousand dollars.

[fol. 61] To Robert R. McBurney, Ten Thousand dollars.

To J. R. Hatmaker, Ten Thousand dollars.

I direct my Executors to set apart out of my estate, in separate funds, sufficient money or securities to produce the following several annuities, and to pay from the income of one of such sums in each year to Mrs. William Turnbull, through James H. Breslin, the sum of Twelve Hundred dollars; and to pay from the income of one of such sums in each year the sum of Twelve hundred dollars to John G. Earle; and from one of such sums in each year, to pay to Mrs. Jeremiah Simonson the sum of Twelve hundred dollars, and in like manner; annually to pay to Mrs. Sarah Simonson the sum of Six hundred dollars; and to Mrs. Cornelia Littell, annually, the sum of Two hundred dollars. Upon the death of the several annuitants the principal sums set apart to create such annuity shall become and be added to and be part of my residuary estate. The income from all such annuity funds to be paid from the date of my death.

Whenever in my will, or in any Codicil to my Will, my Executors are authorized or directed to do anything the same shall be done by them, the survivors or survivor of them, or of such of them as may qualify, and their judgment shall be final in respect of any division of my estate to be made by them. None of my Executors shall be responsible either as Executor or Trustees, for the acts, omissions or defaults of any other of my Executors or trustees, nor shall

either of them be called upon to give bonds as security under this my Will.

Fourteenth. I give and bequeath to the Young Men's Christian Association of the City of New York, One Hundred thousand dollars, and I desire that so much of the in- [fol. 62] come arising therefrom as can be usefully employed for that purpose be used for Christian work among railroad employees, and I direct that such income be paid over to Frederick W. Vanderbilt, Chauncey M. Depew, Charles C. Clark, George H. Watrous, J. Pierpont Morgan and John M. Toucey, and the survivors or survivor of them, being the Trustees named in a certain indenture of Lease, dated June 30th, 1886, made by the New York Central and Hudson River Railroad Company and the New Haven and Hartford Railroad Company, parties of the first part, and myself and the Trustees above named, parties of the second part, of premises on the Northeast corner of Madison Avenue and Forty-fifth Street, to be applied by said Trustees to the purposes in their view intended to be accomplished by the building erected on said premises; but should said trusteeship cease, and said building be no longer used for the purposes for which it was erected, then the Young Men's Christian Association shall exercise their judgment as to the manner of disposing of such annual income for the benefit of Railroad employees.

I give and bequeath to the Rector, Church Wardens and Vestrymen of St. Bartholomew's Church, the sum of Two hundred thousand dollars, to be kept safely invested by the said corporation, the annual income to be derived therefrom to be applied, under the direction of the Vestrymen of the Church, to the missionary work of said Parish.

If a building should not have been erected for Church purposes before my death, upon the two lots adjoining said building on East Forty-second Street, now used for Church purposes, I give and bequeath to the Rector, Church Wardens and Vestrymen another Two hundred thousand dollars to erect a fire-proof building upon said two lots, satisfactory [fol. 63] to the Rector. If any amount remains of said last named sum, after the completion of such building, such amount shall be added as principal to the first-named sum of Two hundred thousand dollars, which I have given in this clause of my Will for the missionary work of the Parish.

I give and bequeath to Yale University of New Haven, Connecticut, the sum of One hundred thousand dollars.

To St. Luke's Hospital in the City of New York, Fifty thousand dollars.

To the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, Fifty thousand dollars.

To the Board of Trustees of Vanderbilt University, Nashville, Tennessee, Fifty thousand dollars.

To the Redwood Library at Newport, Rhode Island, Ten thousand dollars.

To the Newport, Rhode Island Hospital, Ten thousand dollars.

To the Christian Home for Intemperate Men in New York, Ten thousand dollars.

To the Manhattan Working Girls' Society of the City of New York, Ten thousand dollars.

To the New York Bible and Common Prayer Book Society, Ten thousand dollars.

I direct that my Executors pay to the Society of St. Johnland, a corporation formed under the laws of this state, the sum of Two thousand dollars annually, so long as the said Society keeps and performs its convenants with me and my wife expressed in a written agreement dated April 13th, 1892, and I authorize my Executors to set apart, or to purchase securities, or to keep them as a trust fund, sufficient to realize the sum of Two thousand dollars per annum for [fol. 64] such purpose, and they may make such arrangements and settle with said Society with reference to said annuity as they may deem advisable.

I also give and bequeath to said Society of St. Johnland Ten thousand dollars.

I give to the Protestant Episcopal Society, for Seamen in the City and Port of New York, Ten thousand dollars.

I give and bequeath to the Metropolitan Museum of Art in the City of New York, one oil painting by J. M. W. Turner, designated as the "Grand Canal, Venice."

Fifteenth: I give and bequeath to each of my family servants, male and female, who have been in my stable or house for two years next preceding my death, one thousand dollars. I give and bequeath to John H. Dempsey five thousand dollars. To Charles A. Whittaker, my coachman, Two thousand dollars. To Toney, my barber for many years, Two

thousand dollars; to John Allen, my farmer, Two thousand dollars.

Sixteenth. I give to my son Alfred G. the gold medal voted by the Congress of the United States to my grandfather Cornelius Vanderbilt in 1865, at the close of the war of the rebellion. If my son Alfred G. be not living, I give the medal to my son Reginald C., and if neither of them are living to my eldest daughter, and I request that the child receiving this medal will leave the same to his or her oldest son with the request that the same may pass to his oldest son.

Seventeenth. All the rest, residue and remainder of all the property and estate, real, personal and mixed, of every de- [fol. 65] scription, and wheresoever situated, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, including all lapsed legacies and the principal of any annuities which may terminate and any part of my estate which may not have been effectually devised or bequeathed, or from any other source, I give, devise and bequeath to my Executors, hereinafter named, and the survivors and survivor of them, in trust, to hold said estate and invest and reinvest the same and to collect the rents, issues, income and profits therefrom for the use of my son Alfred G., and to apply so much of said net income as may be in their judgment advisable, to his support, maintenance and education, and for the care and maintenance of his property during his minority, and to accumulate any surplus income, such accumulations to be paid to him when he arrives at the age of twenty-one years and thereafter to pay the net income of said estate to him as received until he arrives at the age of thirty years when he shall be put in full possession of one-half of the portion of said estate to be set apart for that purpose by my Executors and the survivors of them. And upon further trust thereafter to pay to my said son Alfred G. the income from the balance remaining of said estate until he shall arrive at the age of thirty-five years when he shall be put in possession of the balance of said trust estate, and the said Trustees shall be discharged from any and all liability and responsibility in respect thereof. If my son Alfred G. should die before attaining the age of thirty-five years, leaving issue, such portion of the estate as shall not then have come into his possession shall be divided by my Executors into

[fol. 66] as many equal shares as he may leave children him surviving, and one share shall be held by my Executors to the use of each such child or children until he or she shall attain the age of twenty-one years, when it shall be paid to such child; but if he shall die without child or children, or if none of his children shall attain majority, then it is my Will that my son Reginald C. shall in all respects, as to said residuary estate stand in the place and stead of his brother Alfred G., and that if Alfred shall die without issue before he attains the age of thirty years then Reginald C. shall receive the income from said estate until he attains the age of thirty years when he shall be put in possession of one-half the residuary estate, and thereafter Reginald C. shall receive the net income of the remaining one-half of my estate, and on arriving at the age of thirty-five years shall be put into possession of the whole of said estate, and my said Executors shall hold said estate upon such trust, and I give and devise the same accordingly. If Alfred G. and Reginald C. shall both die before being put into possession of said estate, and without issue, I give whatever then remains of my residuary estate to my daughters, Gertrude and Gladys Moore, share and share alike; and if either of my said daughters be then dead leaving issue, her issue to take his or her mother's share, per stirpes and not per capita; and in default of issue, the survivor shall take the principal.

Eighteenth. I direct that my Executors shall pay out of my estate any and every inheritance, transfer or legacy tax which shall be chargeable upon or under any gifts, devises or bequests made by me in this my Will by reason of such [fol. 67] gifts, devises or legacies under any law of the State of New York, or of the United States or any State therein.

Nineteenth. I nominate and appoint my wife Alice G. Executrix, and my brother William K. Vanderbilt and my friends Chauncey M. Depew and Edward V. W. Rossiter, Executors of this my Will; and I appoint my son Alfred G. and my son Reginald C., Executors thereof as soon as they shall respectively attain majority, and my Executors above named who shall qualify as such Executors, and the survivors or survivor of them, shall be Trustees under the several trust funds and estates by my Will created.

I direct that no compensation or commission, as such, shall be paid to any living Executor or Trustee under this Will, for any services as Executor or Trustee hereunder.

If all my Executors shall die or decline to act, or be incapable of acting, then I nominate and appoint the Union Trust Company in the City of New York, Executor of this my Will and Trustee of the several trusts therein created.

Whenever any single trust fund or any number of trust funds shall have been set apart by my Executors, pursuant to the provisions of this my Will for the execution of any trust thereby created, I authorize and empower my said Executors and Trustees to transfer and convey the property set apart for any such trust to the Union Trust Company of the City of New York, upon the trusts named in this my Will in respect thereof, upon such terms as may be agreed upon between my said Executors and Trustees and the Trust Company, and upon such funds being so transferred [fol. 68] to said Union Trust Company, and its assuming the trust, my Executors and Trustees shall be fully released and discharged with respect to all such trust funds, money and securities embraced in the trust fund so transferred.

Nineteenth. If my father's will and estate shall not have been settled, and I shall not have come into full possession of my share thereof, I authorize my Executors, the survivors or survivor of them, to agree upon a division or partition and to make such settlement, compromise or arrangement as they may see fit, and no inventory, list or accounting shall be required either in respect of my father's estate or my own, and my Executors are fully released from such inventory, list, appraisal or accounting; nor shall any bond be required in any State to qualify my said Executors to act as Executors or Trustees.

Twentieth. In addition to the powers given to my Executors, I authorize them, the survivors and survivor of them, to sell and convey at public or private sale, at such time and upon such terms as they may deem advisable, any and all of my real estate, and I authorize them to employ agents and clerks in and about the management of my estate at such salaries or compensation as to them shall seem reasonable and they shall be reimbursed and all expenses by them incurred shall be charged against such portion of the estate as they may think should reasonably pay the same.

Twenty-first. I hereby revoke all other and former Wills by me at any time made.

In witness whereof I have to this my last Will and Testament set my hand and seal in the City of New York, this [fol. 69] 18th day of June in the year one thousand eight hundred and ninety-six.

C. Vanderbilt. (Seal.)

Subscribed, sealed, published and declared by the said testator Cornelius Vanderbilt, to be his last Will and Testament in the presence of us and of each of us, who, at his request and in his presence, and in the presence of each other have hereunto subscribed our names as witnesses. Henry H. Anderson, 24 Gramercy Park, New York. J. Carstensen, 17 West 120th St., New York. G. S. Prince, Yonkers, N. Y.

CODICIL TO LAST WILL AND TESTAMENT OF CORNELIUS VANDERBILT

I, Cornelius Vanderbilt, do make, publish and declare the following Codicil to my Last Will and Testament bearing date the eighteenth day of June one thousand eight hundred and ninety-six.

First. In addition to the legacy to the Rector, Churchwardens and Vestrymen of St. Bartholomew's Church given in the fourteenth clause of my said Will, and the provisions in said clause subsequently made for the erection of a building for church purposes, and intending to further provide for the missionary work of St. Bartholomew's Parish, I give and bequeath to the Rector, Churchwardens and Vestrymen of St. Bartholomew's Church the further sum of [fol. 70] Two hundred thousand dollars to be safely invested by the said corporation, the annual income to be derived therefrom to be applied under the direction of the Vestrymen of the church to the missionary work of said Parish.

Second. In the nineteenth clause of my said Will I have nominated and appointed the Union Trust Company of the City of New York to be and act as Executor and as Trustee

of my said Will in certain contingencies, and given authority to my Executors to transfer and convey property set apart for certain trusts to said Trust Company also in certain contingencies all of which contingencies are set out in detail in the said nineteenth clause of my Will. I now revoke the provisions of the said nineteenth clause of my said Will, so far only as they apply to the Union Trust Company of the City of New York, and constitute and appoint the United States Trust Company of New York in its place, and direct that all and singular the provisions in the said clause which apply to the said Union Trust Company shall apply instead to the said United States Trust Company of New York. It is not my intention to, and I do not by this Codicil, in any way revoke or otherwise alter or disturb any of the provisions of the said nineteenth clause except to substitute in its provisions the said United States Trust Company for the said Union Trust Company, and with the said substitution I reaffirm the said nineteenth clause.

Third. As modified by this Codicil, I ratify and confirm my said Will.

In witness whereof I have to this Codicil to my Last Will and Testament subscribed my name and affixed my seal the [fol. 71] twenty-fourth day of April in the year one thousand eight hundred and ninety-seven.

C. Vanderbilt. (Seal.)

Subscribed, sealed, published and declared by Cornelius Vanderbilt, the Testator, as and to be a Codicil to his Last Will and Testament, in the presence of us and of each of us, who, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses. Henry B. Anderson, 113 East 57th St., New York City. G. S. Prince, 80 Ashburton Avenue, Yonkers, N. Y. Warren S. Crane, Jamaica, N. Y.

Second Codicil to Last Will and Testament of Cornelius Vanderbilt

I, Cornelius Vanderbilt, do make, publish and declare the following codicil to my last Will and Testament bear-

ing date the Eighteenth day of June One thousand eight hundred and ninety-six.

First. In addition to the provisions which, in my said last Will and Testament, I have made for the benefit of my daughter Gertrude V. Whitney, in my said Will referred to as Gertrude Vanderbilt, and without intending to alter or disturb any of such provisions, I give and bequeath to her the sum of One million dollars ($1,000,000) absolutely.

[fols. 72-116] Second: I give and bequeath to John A. Peterson, now in my employ, the sum of Ten thousand dollars ($10,000).

Third: On the Twenty-fourth day of April in the year One thousand eight hundred and ninety-seven, I made and published a codicil to my said last Will and Testament, and it is not my intention by the making and publishing of this codicil to in any way affect, alter or supersede that codicil, which I hereby ratify and confirm.

Fourth. As modified by this codicil, I ratify and confirm my said Will and codicil.

In witness whereof I have to this my Second Codicil to my last Will and Testament subscribed my name and affixed my seal the fourth day of April in the year One thousand eight hundred and ninety-nine.

C. Vanderbilt. (Seal.)

Subscribed, sealed, published and declared by the said Cornelius Vanderbilt, the Testator, as and for the Second Codicil to his last Will and Testament, in our presence, who at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses. Edward L. Rossiter, 781 Carroll St. Bklyn. Chandler P. Anderson, 784 Fifth Avenue, New York City. Henry B. Anderson, 113 East 57th St., N. Y. City.

[fol. 117] EXPLANATORY MEMORANDUM OF STATE TAX COMMISSION CONCERNING ENACTMENT OF SUBDIVISION 7-A OF SECTION 249-R OF THE TAX LAW

State of New York

[Seal]

Department of Taxation and Finance
Albany

September 29, 1936.

Root, Clark, Buckner & Ballantine, 31 Nassau Street, New York City.

GENTLEMEN:

Your letter of September 26 to the State Librarian in regard to subdivision 7-a of Section 249-r of the Tax Law was referred to the Tax Library.

Although the minutes are taken of everything which transpires in the Senate and Assembly the time a bill is under discussion, yet these minutes are not transcribed unless there is a special request for them. When they are transcribed they are not for public distribution. This statement is without doubt true of what goes on in committees to which bills are referred; there is again no public record. However, as this bill was a Tax Department bill there was in the Tax Department files a memorandum written by the Tax Department counsel to the President of the Tax Commission. It is customary for the President of the Tax Commission to send memoranda on all tax department bills to the Governor. Department bills usually consist of ones which remedy discrepancies in the laws, usually introduced [fol. 118] in both houses by members of the committee on taxation and finance. They are very seldom bills over which there would be any controversy.

Enclosed is a copy of the memorandum in regard to this Section which was in the Tax Department files. I think this memorandum explains the situation.

Very truly yours,

Beulah Bailey, Research Assistant, Dep't. Taxation & Finance.

BB:T.

Chapter 320, Laws 1932

Amending Section 249-r of the Tax Law by the Addition of Subdivision 7-a

Under the inheritance tax laws in effect prior to September 1, 1930, where a person created a power of appointment, general, special or limited, provision was made that the property to which such power related should not be subject to death taxation in the estate of the grantor of the power in the event the power should be exercised, but should be taxable in the estate of the person exercising the power. Under the estate tax act in effect from 1925 to September 1, 1930, property transferred subject to general, special or limited powers of appointment was subject to tax in the estate of the grantor of the power. The estate tax law which took effect on September 1, 1930 taxes the exercise of a general power of appointment, but does not tax the exercise of a special or limited power of appointment. For this reason, property now transferred by the exercise of a [fol. 119] special or limited power of appointment created prior to September 1, 1930 may in some cases escape taxation in both the estate of the grantor and the estate of the grantee of the power. Equitably there should be one tax on property so transferred. This bill provides that property transferred by the exercise of a special or limited power of appointment shall be included in the decedent's gross estate for the purpose of the present estate tax in the event it is not taxable or has not been taxed in the estate of the grantor of the power and thus insures that one death tax will be imposed upon such property.

In Surrogate's Court, County of New York

In the Matter of the Appraisal of the Estate of Alice G. Vanderbilt, Deceased

Present—Hon. James A. Foley, Surrogate

Pro Forma Order Assessing Tax On Estate of Alice G. Vanderbilt—July 13, 1936

On reading the report filed the 25th day of May, 1936, of Jacob Manicoff, Esq., the appraiser appointed by order of

this Court, dated the 21st day of February, 1935, and it ap-
[fol. 120] pearing that the said decedent died on the 22nd day of April, 1934, it is

Ordered and adjudged that the market value of the gross estate of said decedent at the time of death, the amount of exemptions and deductions allowed from said gross estate, the net amount of said estate which is subject to tax under the provisions of Article 10-C of the Tax Law, and the amount of tax to which the same is liable, shall be and the same hereby is assessed, fixed and determined as follows:

Gross estate	$10,770,907.17
Total deductions allowed by statute	766,319.32
Net estate	$10,004,587.85
Tax on net estate not in excess of $150,000 less $55,950.00 exemptions allowed under Section 249-q	$940.50
Tax on net estate in excess of $150,000	1,334,871.69
Total tax	$1,335,812.19

J. A. F., Surrogate.

[fol. 121] In Surrogate's Court, County of New York

Notice of Appeal to Surrogate of Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, Individually and as Executors

Sirs:

Please take notice that Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, individually and as executors of the last will and testament of Alice G. Vanderbilt, deceased, are dissatisfied with the appraisal of the property of said decedent as made in the report of the appraiser filed herein on the 25th day of May, 1936, and with the order assessing, fixing and determining the estate tax in respect to the transfer of the property of said decedent made and entered herein on the 13th day of July, 1936, and hereby appeal to the Surrogate from said appraisal and from said order.

The grounds upon which said appeal is taken are:

I

That the inclusion in the gross estate of the above named decedent, Alice G. Vanderbilt, of the property or any part of the property constituting the principal of the trust created by the Seventh Clause of the will of Cornelius Vanderbilt, which property consists of the cash, bonds and stocks set forth in Schedule F of the Return herein, appraised by the appraiser herein at $5,935,572.07, and over which property said Alice G. Vanderbilt exercised by the Third Article [fol. 122] of her will the special or limited power of appointment granted to her by the Eighth Clause of said will of Cornelius Vanderbilt, is erroneous and illegal for the following reasons:

(a) That said property is not property referred to or described in Section 249-r of Article 10-C of the Tax Law; and in particular is not property the transfer of which is not or was not subject to a death tax in the estate of Cornelius Vanderbilt, the grantor of said power of appointment, but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof, and therefore is not property referred to or described in subdivision 7-a of said Section 249-r of Article 10-C of the Tax Law.

(b) That insofar as it purports to require the inclusion of said property or any part thereof in the gross estate of said Alice G. Vanderbilt for the purpose of measuring, fixing or determining the tax upon the transfer of her net estate, Article 10-C of the Tax Law is unconstitutional and void in that it deprives the appellants of their property without due process of law in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States and Article 1, Section 6 of the Constitution of the State of New York, and deprives them of the equal protection of the laws in violation of said Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States.

[fol. 123] II

That the inclusion in the gross estate of said Alice G. Vanderbilt (a) of so much of the principal of said trust created by the Seventh Clause of said will of Cornelius

Vanderbilt as passed to the appellant Gertrude Vanderbilt Whitney, to wit, the sum of $150,000; and (b) of so much of said principal as passed in equal shares to William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt, sons of Alfred G. Vanderbilt, deceased, to wit, the sum of $500,000, is erroneous and illegal in that said Gertrude Vanderbilt Whitney and said sons of said Alfred G. Vanderbilt took said sums of $150,000 and $500,000, respectively under the will of said Cornelius Vanderbilt and not under or by reason of the exercise of said power of appointment by said Alice G. Vanderbilt.

Dated, New York, September 4, 1936.

Anderson, Gasser, Ferris & Anderson, Attorneys for Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, individually and as executors of the last will and testament of Alice G. Vanderbilt, deceased, Office & P. O. Address: 20 Pine Street, Borough of Manhattan, New York City.

To: Edgar Hirschberg, Esq., Attorney for State Tax Commission, 80 Centre Street, New York City. Charles P. Sheridan, Clerk of Surrogate's Court, New York County.

[fol. 124] In Surrogate's Court, County of New York

Notice of Appeal to Surrogate of Gladys Szechenyi

Please take notice that Gladys Szechenyi (heretofore named and referred to in the above-entitled proceedings as Countess Gladys Szechenyi) is dissatisfied with the appraisal of the property of said deceased as made in the report of the appraiser filed herein on the 25th day of May, 1936, and with the order assessing, fixing and determining the estate tax in respect to the estate of said deceased made and entered herein on the 13th day of July, 1936,

And does hereby appeal to the Surrogate from said appraisal and from said order.

The grounds upon which said appeal is taken are as follows:

I

That the inclusion in the gross estate of the above named decedent, Alice G. Vanderbilt, of the property or any part

of the property constituting the principal of the trust created by the Seventh Clause of the will of Cornelius Vanderbilt, which property consists of the cash, bonds and stocks set forth in Schedule F of the Return herein, appraised by the appraiser herein at $5,935,572.07, and over which property said Alice G. Vanderbilt exercised by the Third Article of her will the special or limited power of appointment granted to her by the Eighth Clause of said [fol. 125] will of Cornelius Vanderbilt, is erroneous and illegal for the following reasons:

(a) That said property is not property referred to or described in Section 249-r of Article 10-C of the Tax Law; and in particular is not property the transfer of which is not or was not subject to a death tax in the estate of Cornelius Vanderbilt, the grantor of said power of appointment, but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof, and therefore is not property referred to or described in subdivision 7-a of said Section 249-r of Article 10-C of the Tax Law.

(b) That insofar as it purports to require the inclusion of said property or any part thereof in the gross estate of said Alice G. Vanderbilt for the purpose of measuring, fixing or determining the tax upon the transfer of her net estate, Article 10-C of the Tax Law is unconstitutional and void in that it deprives the appellants of their property without due process of law in violation of Section I of the Fourteenth Article of Amendment to the Constitution of the United States and Article 1, Section 6 of the Constitution of the State of New York, and deprives them of the equal protection of the laws in violation of said Section I of the Fourteenth Article of Amendment to the Constitution of the United States.

II

That the inclusion in the gross estate of said Alice G. Vanderbilt (a) of so much of the principal of said trust created by the Seventh Clause of said will of Cornelius Vanderbilt as passed to the appellant Gertrude Vanderbilt [fol. 126] Whitney, to wit, the sum of $150,000; and (b) so much of said principal as passed in equal shares to William H. Vanderbilt, Alfred G. Vanderbilt and George Van-

derbilt, sons of Alfred G. Vanderbilt, deceased, to wit, the sum of $500,000, is erroneous and illegal in that said Gertrude Vanderbilt Whitney and said Alfred G. Vanderbilt took said sums of $150,000 and $500,000 respectively under the will of said Cornelius Vanderbilt and not under or by reason of the exercise of said power of appointment by said Alice G. Vanderbilt.

Dated, New York, September 10, 1936.

Root, Clark, Buckner & Ballantine, Attorneys for Gladys Szechenyi, Appellant, Office and P. O. Address, 31 Nassau Street, Borough of Manhattan, New York City.

To: Edgar Hirschberg, Esq., Attorney for State Tax Commission, 80 Centre Street, New York City. Charles P. Sheridan, Clerk of Surrogate's Court, New York County. Messrs. Anderson, Gasser, Ferris & Anderson, Attorneys for Executors of Estate of Alice G. Vanderbilt, etc., 20 Pine Street, New York City.

[fol. 127] In Surrogate's Court, County of New York

Notice of Appeal to Surrogate of Gloria Laura Morgan Vanderbilt, Infant, and of Thomas B. Gilchrist, as General Guardian of Her Property

Sirs:

Please take notice that Gloria Laura Morgan Vanderbilt, infant, by Thomas B. Gilchrist as General Guardian of her property, and Thomas B. Gilchrist as General Guardian of the property of said infant, the said Gloria Laura Morgan Vanderbilt, infant, being a person interested in the gross estate of Alice G. Vanderbilt, deceased, as a legatee under Article First of the Last Will and Testament of said deceased, and being also one of the remaindermen of a certain trust created under Clause Seventh of the Last Will and Testament of Cornelius Vanderbilt, deceased, who died a resident of the County of New York on September 12, 1899, the property comprising which said trust was not required to be included, but was in fact included, in the gross estate of said Alice G. Vanderbilt, deceased, are dissatisfied with the appraisal of the property of said Alice G. Vander-

bilt as made in the report of the appraiser filed herein on the 25th day of May, 1936, and with the order assessing, fixing and determining the estate tax in respect to the transfer of the property of said decedent made and entered herein on the 13th day of July, 1936, and hereby appeal to the Surrogate from said appraisal and from said order. [fol. 128] The grounds upon which this appeal is taken are as hereinafter severally set forth, viz.:

First

That the inclusion in the gross estate of the above named Alice G. Vanderbilt of the whole or any part of the property constituting the trust created by Clause Seventh of the Will of Cornelius Vanderbilt, deceased, which said trust fund was composed of the cash, bonds and stocks set forth in Schedule F of the Executors' Return herein, appraised by the Appraiser herein at $5,935,572.07, over which the said Alice G. Vanderbilt exercised by Article Third of her Will the special or limited power of appointment vested in her by Clause Eighth of the Will of Cornelius Vanderbilt is improper, erroneous and illegal for each and every one of the following separate and distinct reasons, to wit:

(a) For the reason that the property comprising said trust fund was not property which belonged to or was owned by the said Alice G. Vanderbilt at the time of her death and was in no sense the property of said deceased and did not constitute a part of her estate.

(b) For the reason that the property comprising said trust fund was not transferred by the said Alice G. Vanderbilt and did not pass under her Will or under the special or limited power of appointment exercised by her, but was transferred by and passed under the Will of Cornelius Vanderbilt, who died a resident of the City, County and State of New York on September 12, 1899.

(c) For the reason that the property comprising said trust fund does not constitute a part of the "gross estate" [fol. 129] of the said Alice G. Vanderbilt, deceased, as defined in Section 249-r of Chapter 10-C of the Tax Law or in any subdivision of said Section 249-r, and more particularly is not property referred to or described in subdivision 7-a of said Section 249-r and thereby required to be included in the decedent's "gross estate".

(d) For the reason that subdivision 7-a of Section 249-r of Chapter 10-C of the Tax Law does not apply to the property comprising said trust fund, in that the said Cornelius Vanderbilt died on September 12, 1899, and the transfer of the property comprising said trust fund was then the subject of a death tax imposed in certain transfer tax proceedings relative to the estate of Cornelius Vanderbilt, and a large and substantial transfer or death tax was then paid thereon to the State of New York by the estate of Cornelius Vanderbilt,

(e) For the reason that subdivision 7-a of Section 249-r of Chapter 10-C of the Tax Law does not apply to the property comprising said trust fund, in that the laws of the State of New York relating to taxable transfers of property which were in effect at the death of the said Cornelius Vanderbilt on September 12, 1899 did not, as appellants are informed and verily believe, provide for the taxation, in the estate of the donor of a power of appointment, of the transfer of a remainder or other future interest where the ultimate devolution thereof was uncertain or undetermined by reason of the fact that such remainder or future interest was given, devised or bequeathed subject to a power of appointment; and more particularly because Section 230 of the Tax Law as amended by Chapter 76 of the Laws of 1899 did not, as appellants are informed and [fol. 130] verily believe, apply, refer to or impose a death tax or other transfer tax upon the transfer of a remainder or future interest given, devised or bequeathed subject to a power of appointment.

(f) For the reason that the non-taxability in the estate of Cornelius Vanderbilt of the transfer of the remainder interests in said trust fund did not arise or result from the existence of a statute; and accordingly the said remainder interests are not property of the nature and character described or referred to in subdivision 7-a of Section 249-r of Article 10-C of the Tax Law and required thereby to be included in the "gross estate" of Alice G. Vanderbilt.

(g) For the reason that, even if there were a law of the State of New York in effect at the death of Cornelius Vanderbilt which rendered the transfer of the remainder interests in said trust fund subject to a death tax, then, in such case, said remainder interests were or would now be

taxable in the estate of said Cornelius Vanderbilt, and by the terms of subdivision 7-a of Section 249-r of Chapter 10-C of the Tax Law, the said remainder interests would not and do not constitute a part of the "gross estate" of Alice G. Vanderbilt, deceased, and should not have been included therein.

Second

That, if subdivision 7-a of Section 249-r of Article 10-C of the Tax Law, or any other subdivision or section of said Article of the Tax Law, should be construed as requiring that the transfer of the trust fund created under Clause Seventh of the will of Cornelius Vanderbilt, deceased, be included to any extent in the gross estate of Alice G. Van- [fol. 131] derbilt (which appellants do not concede), then the value of said trust fund as appraised by the appraiser, and as fixed and determined by the taxing order from which this appeal is taken, is incorrect and erroneous, in that the said trust fund has been appraised at the market value of the capital of the trust fund at the death of Alice G. Vanderbilt, whereas at most only the remainder interests in said trust fund are taxable, and the said remainder interests should be appraised at the fair market value of the capital of the trust fund diminished by the value of the life interest of the late Alice G. Vanderbilt in said trust fund.

Third

That, if subdivision 7-a of Section 249-r of Article 10-C of the Tax Law, or any other subdivision or section of said Article of the Tax Law, should be construed as requiring that the transfer of the trust fund created under Clause Seventh of the will of Cornelius Vanderbilt, deceased, be included to any extent in the gross estate of Alice G. Vanderbilt (which appellants do not concede), then the value of said trust fund as appraised by the appraiser, and as fixed and determined by the taxing order from which this appeal is taken, is incorrect and erroneous, in that the appraiser has improperly included in the value of said trust fund the sum of $150,000 which passed to Gertrude Vanderbilt Whitney and the sum of $500,000 which passed in equal shares to William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt, sons of the late Alfred G. Vanderbilt, whereas the said Gertrude Vanderbilt Whitney, William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt

[fol. 132] have, as appellants are informed, elected to take said sums in the aggregate amount of $650,000 directly by the will of Cornelius Vanderbilt, deceased, and not by virtue of the special or limited power of appointment exercised or purported to be exercised by said Alice G. Vanderbilt.

Fourth

That, if said subdivision 7-a of Section 249-r of Article 10-C of the Tax Law or any other subdivision or section of said article of the said Tax Law, should be construed as requiring the inclusion in the "gross estate" of Alice G. Vanderbilt of the property or any part of the property constituting the trust created by the Seventh Clause of the will of Cornelius Vanderbilt, said subdivision or subdivisions or sections would be unconstitutional in that they would deprive the appellants of their property without due process o. law in violation of Section I of the Fourteenth Article of Amendment to the Constitution of the United States of America.

Fifth

That, if the said subdivision 7-a of Section 249-r of Article 10-C of the Tax Law or any other section or subdivision of said Article of the Tax Law should be construed as requiring the inclusion in the "gross estate" of Alice G. Vanderbilt of the property or any part of the property constituting the trust created by the Seventh Clause of the will of Cornelius Vanderbilt, said section or subdivision would be unconstitutional in that they would deprive appellants of the equal protection of the laws in violation of said [fol. 133] Section I of the Fourteenth Article of Amendment to the Constitution of the United States of America.

Sixth

That, if said subdivision of 7-a of Section 249-r of Article 10-C of the Tax Law or any other subdivision or section of said Article of the said Tax Law should be construed as requiring the inclusion in the "gross estate" of Alice G. Vanderbilt of the property or any part of the property constituting the trust created by the Seventh Clause of the will of Cornelius Vanderbilt, said subdivision or subdivisions or sections would be unconstitutional in that they

would deprive the appellants of their property without due process of law in violation of Section 6 of the Constitution of the State of New York.

Seventh

That, upon each and every one of the grounds above stated, the amount of the estate tax as assessed, fixed and determined in the aforesaid pro forma order dated July 13, 1936, is excessive, and estate tax as fixed and assessed therein is unjust, incorrect and unlawful, and should be modified or set aside to the extent that it affects the interest of the infant, Gloria Laura Morgan Vanderbilt.

Appellants further expressly reserve their rights to enforce or require payment of the tax, if any, by the executors of the will of Alice G. Vanderbilt, deceased, pursuant to the provisions of Paragraph Thirteenth of said will, or by the executor of or the residuary legatees under the will of [fol. 134] Cornelius Vanderbilt, deceased, pursuant to the provisions of Clause Eighteenth of said will, and this appeal shall be without prejudice to the rights of appellants to require that any estate tax assessed or imposed herein shall be paid out of the residuary estate of Alice G. Vanderbilt, deceased, or out of the residuary estate of Cornelius Vanderbilt, deceased.

Dated: September 11, 1936.

Thomas B. Gilchrist, as General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant. Cadwalader, Wickersham & Taft, Attorneys for Thomas B. Gilchrist as General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant, Office and Post Office Address: No. 14 Wall Street, Borough of Manhattan, New York City.

To: Messrs. Anderson, Gasser, Ferris & Anderson, Attorneys for Executors of the Estate of Alice G. Vanderbilt, deceased, No. 20 Pine Street, Borough of Manhattan, City of New York. Edgar Hirschberg, Esq., Attorney for State Tax Commission, No. 80 Centre Street, New York City. Clerk of the Surrogates' Court of the County of New York, Hall of Records, Borough of Manhattan, City of New York.

[fol. 135] IN SURROGATE'S COURT, COUNTY OF NEW YORK

NOTICE OF APPEAL TO SURROGATE OF CATHLEEN VANDERBILT LOWMAN

SIRS:

Please take notice that Cathleen Vanderbilt Lowman as one of the Appointees under the will of Alice G. Vanderbilt of the trust fund appointed under Paragraph Third of the will of said Alice G. Vanderbilt, is dissatisfied with the appraisal of the property of said decedent, as made in the report of the appraiser filed herein on the twenty-fifth day of May, 1936, and with the order assessing, fixing and determining the Estate Tax in respect of the transfer of the property of said decedent made and entered herein on July 13, 1936, and hereby appeals to the Surrogate from said appraisal and from said order.

The grounds upon which said appeal is taken are:

I. That the inclusion in the gross estate of the above-named decedent, Alice G. Vanderbilt, of the value of the property or any part thereof constituting the principal of the trust created by the Seventh Clause of the will of Cornelius Vanderbilt, consisting of the cash, bonds, and stocks set forth in Schedule F of the return herein, appraised by the appraiser herein at $5,935,572.07 and over which property said Alice G. Vanderbilt exercised by the [fol. 136] Third Article of her will a special or limited power of appointment granted to her by the Eighth Clause of the said will of Cornelius Vanderbilt, is erroneous and illegal for the following reasons:

A. That under the provisions of Article 10-C of the Tax Law, the value of the said property or any part thereof should not have been included in the gross estate of the decedent, Alice G. Vanderbilt, and not taxed therein.

B. That insofar as it purports to require the inclusion of said property or any part thereof in the gross estate of said Alice G. Vanderbilt for the purpose of measuring, fixing or determining the tax upon the transfer of her net estate, Article 10-C of the Tax Law is unconstitutional and void, in that it deprives the appellant of her property without due process of law in violation of Section I of the Fourteenth Article of Amendment to the Constitution of the

United States and Article 1, Section 6 of the Constitution of the State of New York, and deprives her of the equal protection of the laws in violation of said Section I of the Fourteenth Article of Amendment to the Constitution of the United States.

II. That the inclusion in the gross estate of said Alice G. Vanderbilt (a) of so much of the principal of said trust created by the Seventh Clause of said will of Cornelius Vanderbilt as passed to the appellant Gertrude Vanderbilt Whitney, to wit, the sum of $150,000; and (b) of so much of said principal as passed in equal shares to William H. [fol. 137] Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt, sons of Alfred G. Vanderbilt, deceased, to wit, the sum of $500,000, is erroneous and illegal in that said Gertrude Vanderbilt Whitney and said sons of said Alfred G. Vanderbilt took said sums of $150,000 and $500,000 respectively under the will of said Cornelius Vanderbilt and not under or by reason of the exercise of said power of appointment by said Alice G. Vanderbilt.

This appeal is taken by the appellant, Cathleen Vanderbilt Lowman, on the grounds aforesaid, by reason of the fact that the report of the appraiser and the order assessing the tax herein have included as a part of the "gross assets" of the estate of Alice G. Vanderbilt, deceased, the remainder interests in the said trust fund created under the Seventh Clause of the will of Cornelius Vanderbilt, deceased.

In taking this appeal, the said appellant does not concede that the said remainder interests in the said trust fund are required to be included in the "gross assets" of the estate of the said Alice G. Vanderbilt, deceased.

This appeal is also taken without prejudice to the right of the said appellant, Cathleen Vanderbilt Lowman, in the event that the tax herein, or any part thereof, is sustained and eventually apportioned to the said appellant, to claim that the Executor of the will of the said Cornelius Vanderbilt, deceased, is obligated to make payment of the full amount of such tax, if any, or to reimburse the appellant for any part of the said tax which may be apportioned to her together with her expenses in taking this appeal, all

[fol. 138] pursuant to the provisions of the Eighteenth Clause of the will of Cornelius Vanderbilt, deceased.

Dated, New York, N. Y., September 11, 1936.

Yours, etc., Leboeuf, Winston, Machold & Lamb, Attorneys, for Cathleen. Vanderbilt Lowman, Office and Post Office Address, No. 15 Broad Street, Borough of Manhattan, New York, N. Y.

To: Edgar Hirschberg, Esq., Attorney for State Tax Commission, 80 Centre Street, Borough of Manhattan, New York, N. Y. Charles P. Sheridan, Esq., Clerk of Surrogate's Court, New York County, Pearl & Centre Streets, Borough of Manhattan, New York, N. Y.

[fol. 139] In Surrogate's Court, County of New York

Opinion and Decision of Surrogate Foley—Filed June 7, 1937

(163 Misc. 667)

Estate of Alice G. Vanderbilt

This is an appeal by the executors and by individual beneficiaries from the pro forma order of July 13th, 1936 fixing the estate tax upon the appraiser's report.

Cornelius Vanderbilt died on September 12th, 1899. Under his will, among other bequests, he gave to his wife, Alice G. Vanderbilt, the decedent here, a fixed annual income of $250,000. Provision was made for the setting aside of a trust fund of securities sufficient to pay that annual amount. He conferred upon her a limited power of appointment over the principal of the fund restricting her in her disposition to legacies to be given to their issue in such shares as she should direct in her last will. In default of the exercise by Mrs. Vanderbilt of this limited power, he provided that the fund be divided among their four children equally, with substitution in case of the death of any of them to their issue or to the survivors where there was no issue of any deceased child.

Mrs. Vanderbilt died on April 22nd, 1934. Her will exercised the power of appointment by specific reference to the terms of her husband's will. She gave to her daughter,

Gertrude V. Whitney $150,000, and to the issue of her deceased son, Alfred $500,000. Of the residue she gave one-third to the issue of her deceased son, Reginald, and the remaining two-thirds to her daughter, Gladys Szechenyi.

In his report in the pending estate, the tax appraiser has found the value of the fund at the date of the death of Mrs. [fol. 140] Vanderbilt to have been $5,935,572.07. He has taken the full value of the fund without reference to any deduction for the value of the life estate of Mrs. Vanderbilt. He has added the full undiminished value to the personal estate left by her. The combined gross estate as found by him is $10,770,907.17. The net estate is fixed at $10,004,587.85. A tax has been assessed against the succession to this amount in the sum of $1,335,812.19. By the inclusion of the appointed fund the total tax has been increased by approximately $900,000. and the tax upon her personal estate has been increased by approximately $200,000.

The grounds of appeal are first that there was erroneously included as part of the decedent's gross estate the appraised value of the appointed fund, and second that there was erroneously included in the appraised value of the appointed fund, (a) the amount of the appointed legacy bequeathed by Mrs. Vanderbilt to her daughter, Mrs. Whitney, and (b) the amounts of the appointed legacies passing to the three children of her son Alfred. Upon the second ground of appeal these beneficiaries asserted a right to elect to take their shares under the donor's will and thereby to renounce the lesser benefits derived by them under the donee's will.

The second ground of appeal may be disposed of readily. It is sustained. The amounts payable to the designated legatees under the exercise of the appointment are less than they would have received had the power not been exercised. In default of the power they would have taken greatly increased shares under the will of Cornelius Vanderbilt. Under such circumstances the law is clear that they may elect to take under the will of the donor and not under the [fol. 141] exercise of the power by the donee. (Matter of Ripley, 122 App. Div. 419, aff'd. 192 N. Y. 536; Matter of Slosson, 216 N. Y. 79; Matter of Taylor, 121 Misc. 7, aff'd. 209 App. Div. 299, aff'd. 239 N. Y. 582.) By this disposition these legacies do not escape taxation for they become taxable in the estate of the donor in a proper proceeding. The amounts, however, of their respective shares must be eliminated from the gross estate of the decedent here and the

tax recomputed. The pro forma order in this respect is therefore modified.

There remains for disposition the first ground of appeal. It is contended in the briefs of the appellants (1) that subdivision 7-a of Section 249-r of Article 10-C of the Tax Law, under which the appraiser included the appointed fund as part of this decedent's gross estate, did not permit such inclusion; (2) that if that section did authorize such inclusion it is violative of both Federal and State constitutions since the State has attempted to tax property without due process of law by imposing a tax upon the exercise by the donee of a limited power of appointment; (3) that property passing under a limited power is not the property of the donee of the power and that by reason of the substitution by the Legislature in 1930 of an estate tax (Article 10-C) in place of the former transfer tax (Article 10) such property may not be included in the gross estate of the donee of the power; and (4) that if the fund be held taxable there should be deducted therefrom the value of the life estate of this decedent. All these contentions and the entire ground of appeal are overruled.

[fol. 142] It is unnecessary to discuss at length the principles applicable to the taxation of powers of appointment which have been so clearly fixed by the Court of Appeals. These well established rules dispose of many of the arguments of the appellants. Briefly stated these rules are as follows: (1) the property passing under the exercise of a power of appointment is taxable in the donee's estate; (2) regardless of any technical question as to the donee's title it is the donee's exercise of the power that renders it taxable in his estate; (3) it is the exercise of the power rather than the creation thereof which effected the transfer and therefore no transfer is taxable until the power is exercised, or it is found that default in exercising the power has actually occurred; (4) the exercise of the power is taxable in the donee's estate even though at the time of the creation of the power there was no law in force taxing such transfers; (5) the Court of Appeals has drawn no distinction between general and limited powers of appointment and the latter are taxable in the donee's estate, when exercised; and (6) it is only where the donee of the power fails to exercise it that the fund or property subject to the power is referred back to the donor's estate for taxation.

Under the Transfer Tax Law prior to 1897, property passing, pursuant to the exercise of a power of appointment, was taxable only in the estate of the donor. (Matter of Stewart, 131 N. Y. 274.) That policy was changed by Chapter 284 of the Laws of 1897, which provided for the taxation of such property in the estate of the donee. This modification was accomplished by the addition of subdivision 5 to Section 220 of the Tax Law (enacted April 16, 1897.) It was in effect at the date of death of Cornelius [fol. 143] Vanderbilt on September 12th, 1899. Subdivision 5 provided:

"Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will."

Thereafter the Legislature by Chapter 76 of the Laws of 1899 (in effect March 14, 1899) amended Section 230 of the Tax Law to provide:

"When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon such transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith, out of the property transferred. * * *"

The Court of Appeals held that the latter amendment in no way affected or repealed subdivision 5 of Section 220 set forth above. (Matter of Howe, 176 N. Y. 570.) At the date of death of Cornelius Vanderbilt, therefore, the Tax Law [fol. 144] specifically provided for the imposition of the tax in the donee's estate in the event that the power was exercised. In the exaction of a tax under this section, the court did not differentiate between general and limited powers of appointment. The leading authorities have sustained the taxability of a limited power. (Matter of Vanderbilt, 50

App. Div. 246, aff'd. 163 N. Y. 597; Matter of Dows, 167 N. Y. 227, sustained sub-nom Orr v. Gilman, 183 U. S. 278; Matter of Howe, supra; Matter of Delano, 176 N. Y. 486; Matter of Wendel, 223 N. Y. 433.) The tax was imposed in the donee's estate even though at the time the power was created there was no law in force taxing such transfers. (Matter of Vanderbilt, 50 App. Div. 246, aff'd. 163 N. Y. 597; Matter of Dows, supra.) The same treatment was accorded powers created by deeds executed long before the existence of any transfer tax law. (Matter of Delano, supra.)

It will thus be seen that the contentions of the appellants in so far as they question the condition of the law existing at the date of death of Cornelius Vanderbilt in 1899 are without support in the authorities. A limited power of appointment was taxable in the donee's estate. Taxation was postponed until the death of the donee. The constitutional authority of the State to tax had been sustained by the United States Supreme Court in Chanler v. Kelsey, 205 U. S. 466 sustaining Matter of Delano, 176 N. Y. 486, Orr v. Gilman, 183 U. S. 278.

The addition of the appointed fund here to the individual property of Mrs. Vanderbilt was therefore proper.

Equally untenable is the contention of the appellants that the order which fixed the tax in the Estate of Cornelius [fol. 145] Vanderbilt is res judicata. It is asserted in this connection that the failure to include a specific provision in the order in that estate suspending taxation until the death of the donee, was a complete and final adjudication that the appointive fund was forever exempt from taxation. It is also asserted that the Court of Appeals in its decision on the appeal from that order in some way held the transfer to be taxable only in the estate of the donor. Both of these claims find no support in the applicable law or in the actual adjudications in the tax proceeding in Mr. Vanderbilt's estate.

Upon the first contention it has been the law of this State for many years that the omission in the appraiser's report or in the order entered thereon, of a provision suspending taxation of the remainder of a fund is not an adjudication as to the exemption of the estate of the donee where the power was exercised or an adjudication as to the exemption of the estate from future taxation in default of the exercise of the power. (Matter of Naylor, 189 N. Y. 556, aff'g. 120

App. Div. 738; Matter of Duff, 114 Misc. 309, aff'd. 196 App. Div. 969; Matter of Goldenberg, 187 App. Div. 692; Matter of Bucki, 172 App. Div. 455; Matter of Seligmann, 170 App. Div. 837; Matter of Carey, 197 App. Div. 566, aff'g. 115 Misc. 732 on opinion below; Matter of Jesup, 155 Misc. 846.) It was the practice in the Surrogate's Courts throughout the State after the enactment in 1897 of Section 220, subdivision 5, to make a simple order taxing the actual transfers in the donor's estate. The existing law itself provided for taxation in the event of the exercise or non-exercise of the power. (Matter of Howe, supra.) [fol. 146] The mention of postponement or suspension in the order was therefore unnecessary. In 1899 when Mr. Vanderbilt died there was no specific provision for suspension in the statute. That provision came into the law in 1911 (Chapter 800, Laws of 1911, in effect July 28, 1911) with respect to taxing contingent remainders and suspending the tax until the actual eventuality became fixed. These amendments and the cases which construe them, however, have no application to the present estate except as historical interest. (Matter of Zborowski, 213 N. Y. 109; Matter of De Cordova, 199 App. Div. 492, aff'd. 234 N. Y. 514.) In Matter of Duff, Matter of Naylor and Matter of Goldenberg cited above, there was no express provision for suspension in the original order but its absence in each of these cases was held not to preclude the fixation of the tax in subsequent years under statutory authority. It is stated in Matter of Goldenberg, supra, that the circumstance that the order is silent as to a transfer or estate does not bar the parties interested from asserting their rights in a subsequent proceeding "for the only matters that are res judicata are those embodied in an order or judgment and not those omitted therefrom" (187 App. Div. 692, at page 696.)

Here, taxation of the remainder was properly held in abeyance and the mere statement in the appraiser's report of the valuation of the remainder of the fund was sufficient to indicate that the right to tax was reserved by the State for future determination. The defense of res judicata is not available to the executors or legatees on this phase of the case.

Upon the alternative ground urged as res judicata, neither [fol. 147] the record in Matter of Vanderbilt, 172 N. Y. 69, nor the determinations of the lower courts, nor the decision of the Court of Appeals sustain the executor's contentions

that the final determination in that proceeding is conclusive in the present proceeding. The Court of Appeals did not hold that a tax should have been imposed in the donor's estate upon the appointive fund. There is no indication whatsoever in its opinion that the transfer was declared taxable in that estate. The appeal of the State Comptroller whereby he sought to tax the appointive fund presently in the donor's estate was abandoned before the case reached the Court of Appeals. The final determination of that Court did not affect the fund involved in this proceeding. It was the residuary trust fund that was considered, which, as stated by Chief Justice Cullen in his analysis of the Vanderbilt decision, in the Matter of Burgess (204 N. Y. 265 at page 269) contained "no power of appointment". The decision only sustained the validity of Section 230 of the Tax Law and held that under its provisions the tax on the contingent residuary interests was immediately payable out of the estate to be computed at the highest rate at which any contingency the property might be taxable.

Undoubtedly, if the Court of Appeals had been asked to rule upon the alleged contradiction between the terms of Section 230 and Section 220 of the Tax Law it would have held in Matter of Vanderbilt, as it subsequently held in Matter of Howe, 176 N. Y. 570, that the amendment of Section 230 did not repeal or nullify the provisions of Section 220. It would have held that property passing under a power of appointment should be taxed in the donee's estate as the [fol. 148] section directed just as if the donee of the power was the owner of the property. It would have held further just as it did in Matter of Howe, supra, that the remainders were not taxable until the death of the donee and the final ascertainment of exercise or non-exercise. Furthermore on the question of res judicata the order entered in the Surrogate's Court on the remittitur of the Court of Appeals and upon the stipulation of the parties contained no reference to the taxability of the appointive fund or its exemption. At the time of the preparation and entry of that order there must have been a complete and proper understanding by the attorneys, both for the State and the estate, of the reservation of the right of the State to tax in a subsequent proceeding.

The remaining contention of the appellants involves the interpretation of subdivision 7-a of Section 249-r of the

Tax Law and its applicability to the estate of the donee. That section provides in general as to the manner of the valuation of the gross estate and in particular for the inclusion within it of certain special types of property. The opening sentence of the Section reads:

"*Gross Estate*—The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * * ."

Then follow the enumeration and description of the special kinds of property. Subdivision 7-a of the Section reads:

"To the extent of any property passing under a power of appointment exercised by the decedent (a) by will, * * * [fol. 149] exclusive of property the value of which is required to be included in the gross estate pursuant to paragraph numbered seven of this section, and provided that the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof."

The history of this enactment throws light upon its meaning. When the Decedent Estate Commission, in cooperation with the State Tax Commission, drafted the new Estate Tax Law, the context and policies followed in great part those of the Federal Estate Tax Statutes. The recommendation of the two Commissions was adopted by the Legislature and became Article 10-C of the Tax Law. It became effective on September 1st, 1930. Prior to that date Section 220 of the Tax Law authorized the imposition of a tax in the donee's estate upon the exercise of a power of appointment whether general or limited. The new Estate Tax Law, beginning at the date mentioned above, imposed a tax in the donee's estate only upon the exercise of a general power of appointment. Such was the Federal policy. Limited powers were exempted from taxation by the omission of any express statutory authority to tax them.

In respect of the policy of New York State to tax limited powers in the estate of the donee it was apparent that the terms of the new statute of 1930 substantially changed the

previous rule and permitted such powers to escape taxation in the donee's estate. Thereupon the State Tax Commission [fol. 150] drew the provisions of subdivision 7-a to supplement subdivision 7 which taxed only general powers. The new subdivision 7-a became effective on March 21, 1932. Mrs. Vanderbilt died on April 22, 1934. If her death had occurred between September 1, 1930 and March 21, 1932 the fund here would have been free from taxation. Its succession could not have been taxed in the donor's estate, because the statutory provisions in existence at the date of Cornelius Vanderbilt's death made it taxable, if the power was exercised, only in the estate of the donee. (Section 220.) It could not have been taxed as part of the estate of Mrs. Vanderbilt because it was a limited or special power and its succession was exempt. An explanatory memorandum of the State Tax Commission prepared at the time of the drafting and introduction of the legislative bill has been submitted to the Surrogate by consent of the parties. It is illuminative of the reasons which led to the enactment of new subdivision 7-a. The State Tax Commission pointed out that the existing law in 1932, prior to the enactment of the subdivision, permitted the fund to escape taxation in both the estate of the grantor and the estate of the grantee of the power. It was stated in reference to the measure: "This bill provides that property transferred by the exercise of a special or limited power of appointment shall be included in the decedent's gross estate for the purpose of the present estate tax in the event that it is not taxable or has not been taxed in the estate of the grantor of the power and thus insures that one death tax will be imposed upon such property."

Entirely aside from this memorandum, as I construe the legislative intent in the enactment of the subdivision, it provided for the inclusion in the gross estate of the donee [fol. 151] of property passing under a special or limited power of appointment under the exact terms of the power exercised by Mrs. Vanderbilt and given to her under the will of her husband. The subdivision may be paraphrased as follows: (1) if the original grantor's estate was subject to a tax and impliedly that tax had been paid, no further tax would be imposed under the terms of the subdivision in the donee's estate; (2) if the estate of the grantor would have been taxable except for a statute, which provided that the tax on the transfer of the property should be imposed in the

estate of the grantee, taxation of the fund under the subdivision must be enforced in the grantee's estate when the power is exercised.

This latter statement covers the exact situation in Cornelius Vanderbilt's estate. If Section 220 had not been in existence the tax would have been imposed under Section 230 upon the appointed fund in his estate. The application of Section 220 provided the alternative mentioned in subdivision 7-a for the assessment of the tax in the grantee's estate and exempted the estate of Mr. Vanderbilt from taxation in the event of the exercise of the power. It should be noted in this aspect of the case that counsel for the appellants in their briefs have overlooked those decisions which have held that in default of the exercise of the power, a tax could have been imposed validly in the estate of the grantor. (Matter of Naylor, 189 N. Y. 556; Matter of Duff, 114 Misc. 309, aff'd. 196 App. Div. 969 on the opinion of the Surrogate; Matter of Goldenberg, 187 App. Div. 692.)

Moreover Matter of Burgess, 204 N. Y. 265, cited by them instead of supporting their claims sustains the opposite conclusion reached by the Surrogate. That case only ap- [fol. 152] plied to a power that was contingent, because the right to appoint given by the terms of the will was subject to such conditions that it might never come into existence. In that case the present taxability in the donor's estate was therefore sustained. There were certain trusts, however, in the estate where the powers were vested and not contingent. The Court held that the funds affected by such powers were not presently taxable. Taxation was postponed until exercise and was necessarily required to be assessed in that event in the donee's estate.

The power given by Mr. Vanderbilt to his wife was a vested power and not a contingent power. It was subject to no conditions or contingencies except the choice of his wife to exercise it or not. The latter privilege did not affect the inherent nature of the power as absolutely vested in her. Matter of Burgess, supra, is therefore authority for the conclusion reached by the Surrogate.

Finally there is no unconstitutionality in the inclusion by the Legislature of a statutory declaration that a fund subject to a limited power shall be deemed to be part of the grantee's property. I have pointed out that the question of the constitutionality of the legislative authority to levy that form of taxation was set at rest many years ago by the

United States Supreme Court. (Chanler v. Kelsey, 205 U. S. 466, sustaining Matter of Delano, 176 N. Y. 486; Orr v. Gilman, 183 U. S. 278, sustaining Matter of Dows, 167 N. Y. 227; Matter of Zborowski, 213 N. Y. 109.)

It is the exercise of the power which is the basis of the authority to tax. The Legislature for taxing purpose has created artificial estates which include items clearly not owned in title or in fee by the decedent. Thus it has included [fol. 153] by definition insurance on the decedent's life payable to a designated beneficiary and accruing only at the death of the insured. Irrevocable trusts, in which the decedent has only retained a life interest are included in the gross estate. Similarly, interests in inter vivos trust funds where the enjoyment is subject to change by the exercise by the decedent of a power to alter, amend or revoke are included. The privilege to transmit the appointed fund by will is one conferred by the State. By taxing the privilege the Legislature in its exactments violates neither the Federal or State Constitution.

It is within the authority of the Legislature not only to declare the appointive property to be a part of the estate of the grantee, but also to make the passing of such property subject to the rates of tax in force at the date of death of the grantee; to provide for the exemptions to certain relations and charities at that time and not at the time of the death of the grantor; to fix the rates of tax based upon the relationship of the beneficiaries to the donee and not to the donor; to combine the individual property of the donee with the appointed property in order to compute the rate of tax; to tax the property in its character, realty or personalty, as it exists at the date of death of the donee and to fix its value as of that date rather than at the date of death of the grantor. (Matter of Dows, 167 N. Y. 227; Matter of Sandford, 250 App. Div. 310, N. Y. L. J. March 13, 1937; Matter of Rogers, 71 App. Div. 461, aff'd. on opinion below 172 N. Y. 617; Matter of Walworth, 66 App. Div. 171; Matter of Seaver, 63 App. Div. 283; Matter of Duryea, 250 App. Div. 305, N. Y. L. J. March 13, 1937; Matter of Bucki, 172 App. Div. 455.)

[fol. 154] For similar reasons, the statutes in existence at the date of death of the donee determine the amount of the appointive fund and whether it is to be taxed undiminished or diminished by the value of the life estate of the life tenant. The contention of the appellants that the value of the

securities within the fund at the date of the death of Mrs. Vanderbilt—$5,935,572.07—must be reduced by the deduction of the value of her life estate is overruled. The statute in effect in 1934 at the date of her death made no provision for such deduction. The whole fund as it exists at the date of death of the donee must be included in the gross estate. Similar contentions as to parallel prior statutes have been overruled by the courts. (Matter of Bucki, 172 App. Div. 455; Matter of Seligmann, 170 App. Div. 837.) Since the law in effect at the date of the death of the donee applies, it is likewise immaterial whether the form of tax effective as of that date is a transfer tax or an estate tax. (Matter of Wendel, 223 N. Y. 433; Matter of Keeney, 194 N. Y. 281; Keeney v. N. Y., 222 U. S. 525.)

The difference between the two forms of tax is inconsequential. Simplicity in the method of assessment was effected by the enactment of the Estate Tax Law in 1930. The ultimate charge of the tax against the respective shares is practically the same under both systems of taxation. When the Estate Tax Law was adopted by the Legislature there was also enacted as part of the general program, new Section 124 of the Decedent Estate Law which provides, (in the absence of a contrary direction in the will) for the equitable apportionment and charging of the tax out of the benefits received by the respective legatees. The tax is imposed under either method upon the privilege to transmit the prop- [fols. 155-158] erty by the will of the donee. The privilege may be given or withheld by the State.

The value of the diminished remainder set forth in the appraiser's report in the estate of Cornelius Vanderbilt and the order entered upon it is not conclusive here. The Surrogate was without jurisdiction to fix the value of such remainder in that proceeding. The Surrogate and the appraiser were limited to the valuation of the life estate. (Matter of Naylor, 189 N. Y. 556, aff'g. 120 App. Div. 738; Matter of Bucki, 172 App. Div. 455, 457; Matter of Seligmann, 170 App. Div. 837.)

Submit order on notice overruling the first ground of appeal and sustaining the second ground of appeal and modifying the order fixing the tax in accordance with the provisions of this decision.

J. A. F.

[fol. 159] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

Present: Hon. Francis Martin, Presiding Justice; Hon. James O'Malley, Hon. Alfred H. Townley, Hon. Edward S. Dore, Hon. Joseph M. Callahan, Justices.

6072

In the Matter of the Appraisal Under the Estate Tax Law of the Estate of Alice G. Vanderbilt, Deceased

ORDER OF AFFIRMANCE—October 28, 1938

Appeals having been taken to this Court by Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors etc. of Alice G. Vanderbilt, deceased, said Cornelius Vanderbilt, individually, and Gladys Szechenyi, and by Gloria Laura Morgan Vanderbilt, infant, by Thomas B. Gilchrist, as General Guardian of her property, and Thomas B. Gilchrist, as General Guardian of the property of said infant, and by Cathleen Vanderbilt Lowman, from an order of the Surrogate's Court of the County of New York, entered in the Surrogate's Court on the 28th day of September, 1937, except only so much thereof as sustains the appeals from the pro forma order entered July 13th, 1936, to the extent [fol. 160] of excluding from the gross estate of Alice G. Vanderbilt, deceased, that part of the principal of the trust created under the Seventh Clause of the will of Cornelius Vanderbilt, deceased, which passed to Gertrude Vanderbilt Whitney, William H. Vanderbilt, Alfred G. Vanderbilt, and George Vanderbilt, and said appeals having been argued by Mr. Arthur A. Ballantine of counsel for Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors etc., Cornelius Vanderbilt, individually, and Gladys Szechenyi; by Mr. Thomas B. Gilchrist, as General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant; by Mr. Horace R. Lamb of counsel for Cathleen Vanderbilt Lowman, and by Mr. Mortimer M. Kassell of Counsel for the respondent, State Tax Commission; and due deliberation having been had thereon,

It is hereby unanimously ordered and adjudged that the order so far as appealed from be and the same is hereby affirmed with costs to the respondent.

Enter.

F. M.

[fol. 161] IN SURROGATE'S COURT, COUNTY OF NEW YORK

Present: Hon. James A. Foley, Surrogate.

In the Matter of The Appraisal Under the Estate Tax Law of the Estate of Alice G. Vanderbilt, Deceased

ORDER ON REMITTITUR—November 29, 1938

An appeal having been taken to the Appellate Division of the Supreme Court for the First Department by Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the last will and testament of Alice G. Vanderbilt, deceased, and by said Cornelius Vanderbilt, individually, and by Gladys Szechenyi, and by Cathleen Vanderbilt Lowman, and by Gloria Laura Morgan Vanderbilt, an infant, and by Thomas B. Gilchrist, Esq., as General Guardian of the property of Gloria Laura Morgan Vanderbilt, an infant, from an order of the Surrogate's Court of the County of New York, made and entered on the 28th day of September, 1937, modifying the pro forma order of said Surrogate's Court, made and entered herein on the 13th day of July, 1936, fixing and determining the estate tax herein, and said appellants having appealed from each and every part of said order made and entered on the 28th day of September, [fol. 162] 1937, except only so much and such part thereof as sustains the appeals from said pro forma order to the extent of excluding from the gross estate of Alice G. Vanderbilt, Deceased, that part of the principal of the trust created under the Seventh Clause of the will of Cornelius Vanderbilt, deceased, which passed to Gertrude Vanderbilt Whitney, William H. Vanderbilt, Alfred G. Vanderbilt and George Vanderbilt, and the State Tax Commission having also appealed from said order of September 28, 1937, but having abandoned said appeal,

And, the said Appellate Division having duly heard said appeal, and after due deliberation had thereon having ordered and adjudged that the order of this Court appealed from be affirmed with costs, and having remitted the proceedings to this Court for further action,

Now, upon reading and filing the remittitur from said Appellate Division, and upon motion of Jerome M. Hirsch,

Esq., attorney for the New York State Tax Commission, respondent, it is

Ordered that the said order of said Appellate Division, dated October 28, 1938, be and the same hereby is made the order of this Court, and it is

Further ordered and decreed that, pursuant to the aforesaid order, the State Tax Commission of the State of New York recover from the appellants the sum of $107 65/100 costs and disbursements as taxed.

James A. Foley, Surrogate.

[fol. 163] In Supreme Court of New York, Appellate Division

[Title omitted]

Order Granting Leave to Appeal—December 16, 1938

A motion having been made by Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the Last Will and Testament of Alice G. Vanderbilt, deceased, and said Cornelius Vanderbilt, individually, Gladys Szechenyi, Cathleen Vanderbilt Lowman, Gloria Laura Morgan Vanderbilt, infant, and Thomas B. Gilchrist, as General Guardian of the property of said Gloria Laura Morgan Vanderbilt, infant, appellants herein, for leave to appeal to the Court of Appeals from the order of this Court entered [fol. 164] herein on the 28th day of October, 1938,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Roy C. Gasser in support of said motion, and the affidavit of Mortimer M. Kassell in opposition thereto, and after hearing Mr. Roy C. Gasser for the motion, and Mr. Mortimer M. Kassell opposed,

It is hereby ordered that the said motion be and the same hereby is granted, and this Court hereby certifies that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals.

Enter.

F. M.

[fol. 165] IN SURROGATE'S COURT, COUNTY OF NEW YORK

[Title omitted]

NOTICE OF APPEAL AS OF RIGHT

Please take notice that Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, deceased, said Cornelius Vanderbilt, individually, Gladys Szechenyi, Cathleen Vanderbilt Lowman, Gloria Laura Morgan Vanderbilt, infant, by Thomas B. Gilchrist, as General Guardian of the property of said infant, and Thomas B. Gilchrist, as General Guardian of the property of said Gloria Laura Morgan Vanderbilt, infant, hereby appeal to the Court of Appeals from the order of affirmance of the Appellate Division of the Supreme Court, First Judicial Department, made and entered in the office of the Clerk of the Appellate Division of the Supreme Court, First Judicial Department, on the 28th day of October, 1938, which order unanimously affirmed, in so far as appealed from, the final order of the Surrogate's Court of the County of New York entered in the office of the Clerk of said Surrogate's Court on the 28th day of September, 1937, and a certified copy of which order of said Appellate Division was filed in the office of the Clerk of said Surrogate's Court on the 29th day of [fol. 166] October, 1938, and from the order of the Surrogate's Court of the County of New York made on the 29th day of November, 1938 and entered in the office of the Clerk of said Surrogate's Court on the 30th day of November, 1938, pursuant to said order of affirmance of said Appellate Division; and this appeal is from the whole and each and every part of said order of affirmance of said Appellate Division and from the whole and each and every part of said order of the Surrogate's Court entered pursuant to said order of affirmance of said Appellate Division.

Dated, New York, N. Y., November 30, 1938.

Anderson, Gasser, Ferris & Anderson, Attorneys for Appellants, Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, Deceased, and said Cornelius Vanderbilt, Individually, Office and Post Office Address, 20 Pine Street, Borough of

Manhattan, City of New York. Root, Clark, Buckner & Ballantine, Attorneys for Appellant, Gladys Szechenyi, Office and Post Office Address, 31 Nassau Street, Borough of Manhattan, City of New York. Thomas B. Gilchrist, As General Guardian of the Property of Gloria Laura Morgan Vanderbilt, infant, Office and Post Office Address, 14 Wall Street, Borough of Manhattan, City of New York. [fol. 167] Cadwalader, Wickersham & Taft, Attorneys for Appellant, Thomas B. Gilchrist, as General Guardian of the Property of Gloria Laura Morgan Vanderbilt, infant, Office and Post Office Address, 14 Wall Street, Borough of Manhattan, City of New York. Le Boeuf, Machold & Lamb, Attorneys for Appellant, Cathleen Vanderbilt Lowman, Office and Post Office Address, 15 Broad Street, Borough of Manhattan, City of New York.

To: Jerome M. Hirsch, Esq., Attorney for Respondent, State Tax Commission, 80 Centre Street, Borough of Manhattan, City of New York; Anderson, Gasser, Ferris & Anderson, Esqs., Attorneys for Respondent Gertrude Vanderbilt Whitney, Individually, 20 Pine Street, Borough of Manhattan, City of New York. George Loesch, Esq., Clerk of the Surrogate's Court, New York County. George T. Campbell, Esq., Clerk of the Appellate Division of the Supreme Court, First Department.

[fol. 168] In Surrogate's Court, County of New York

[Title omitted]

Notice of Appeal Pursuant to Leave of Appellate Division

Please take notice that, pursuant to leave granted by the Appellate Division of the Supreme Court, First Judicial Department, in the above entitled proceeding, by an order duly made and filed in the Office of the Clerk of the Appellate Division of the Supreme Court, First Judicial Department, on the 16th day of December, 1938, Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, deceased, said Cornelius Vanderbilt, individually, Gladys Szechenyi,

Cathleen Vanderbilt Lowman, Gloria Laura Morgan Vanderbilt, infant, by Thomas B. Gilchrist, as General Guardian of the property of said infant, and Thomas B. Gilchrist, as General Guardian of the property of said Gloria Laura Morgan Vanderbilt, infant, hereby appeal to the Court of Appeals from the order of affirmance of the Appellate Division of the Supreme Court, First Judicial Department, made and entered in the office of the Clerk of the Appellate Division of the Supreme Court, First Judicial Department, on the 28th day of October, 1938, which order unanimously affirmed, insofar as appealed from, the final order of the [fol. 169] Surrogate's Court of the County of New York entered in the office of the Clerk of said Surrogate's Court on the 28th day of September, 1937, and a certified copy of which order of said Appellate Division was filed in the office of the Clerk of said Surrogate's Court on the 29th day of October, 1938, and from the order of the Surrogate's Court of the County of New York made on the 29th day of November, 1938 and entered in the office of the Clerk of said Surrogate's Court on the 30th day of November, 1938, pursuant to said order of affirmance of said Appellate Division; and this appeal is from the whole and each and every part of said order of affirmance of said Appellate Division and from the whole and each and every part of said order of the Surrogate's Court entered pursuant to said order of affirmance of said Appellate Division.

Dated, New York, N. Y., December 17, 1938.

Anderson, Gasser, Ferris & Anderson, Attorneys for Appellants, Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, Deceased, and said Cornelius Vanderbilt, Individually, Office and Post Office Address, 20 Pine Street, Borough of Manhattan, City of New York. Root, Clark, Buckner & Ballantine, Attorneys for Appellant, Gladys Szechenyi, Office and Post Office Address, 31 Nassau Street, Borough of Manhattan, City of [fols. 170-172] New York. Thomas B. Gilchrist, as General Guardian of the Property of Gloria Laura Morgan Vanderbilt, infant, Office and Post Office Address, 14 Wall Street, Borough of Manhattan, City of New York. Cadwalader, Wickersham & Taft, Attorneys for Appellant, Thomas B.

Gilchrist, as General Guardian of the Property of Gloria Laura Morgan Vanderbilt, Infant, Office and Post Office Address, 14 Wall Street, Borough of Manhattan, City of New York. Le Boeuf, Machold & Lamb, Attorneys for Appellant, Cathleen Vanderbilt Lowman, Office and Post Office Address, 15 Broad Street, Borough of Manhattan, City of New York.

To: Jerome M. Hirsch, Esq., Attorney for Respondent, State Tax Commission, 80 Centre Street, Borough of Manhattan, City of New York. Anderson, Gasser, Ferris & Anderson, Esqs., Attorneys for Respondent Gertrude Vanderbilt Whitney, Individually, 20 Pine Street, Borough of Manhattan, City of New York. George Loesch, Esq., Clerk of the Surrogate's Court, New York County. George T. Campbell, Esq., Clerk of the Appellate Division of the Supreme Court, First Department.

[fol. 173] In Court of Appeals of New York

Witness, The Hon. Frederick E. Crane, Chief Judge, Presiding. John Ludden, Clerk.

Remittitur—July 11, 1939

[fol. 174] In the Matter of the Appraisal under the Estate Tax Law of the Estate of Alice G. Vanderbilt, Dec'd

Be It Remembered, That on the 10th day of January, in the year of our Lord one thousand nine hundred and thirty-nine, Gladys Szechenyi and others, the appellants in this cause, came here unto the Court of Appeals, by Root, Clark, Buckner & Ballantine and others, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And State Tax Commission, the respondent in said cause, afterwards appeared in said Court of Appeals by Jerome M. Hirsch, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 175] Whereupon, The said Court of Appeals having heard this cause argued by Messrs. Arthur A. Ballantine and Thomas B. Gilchrist, of counsel for the appellants, and by Mr. Mortimer M. Kassell, of counsel for the respondent, State Tax Commission, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Surrogate's Court there to be proceeded upon according to law.

[fol. 176] Therefore, it is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted unto the Surrogate's Court, New York County, before the Surrogates thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogate's Court before the Surrogates thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office

Albany, July 11, 1939

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal State of New York, Court of Appeals.)

[fol. 177] Certificates to opinion omitted in printing.

[fol. 178] IN COURT OF APPEALS OF NEW YORK

In the Matter of the Appraisal under the Estate Tax Law of the Estate of Alice G. Vanderbilt, Deceased

GERTRUDE VANDERBILT WHITNEY et al., as Executors of Alice G. Vanderbilt, Deceased, et al., Appellants; State Tax Commission and Gertrude Vanderbilt Whitney, Individually, Respondents

Appeal from an order of the Appellate Division, first department, affirming an order of the Surrogate determining the value of the estate of the decedent for the purpose of the estate tax imposed by article 10-C of the Tax Law.

Arthur A. Ballantine, Roy C. Gasser, Thomas B. Gilchrist, Horace R. Lamb and Leo Gottlieb for Gertrude V. Whitney et al., as executors, et al., appellants.

Thomas B. Gilchrist and Hampton D. Ewing, Jr., for Thomas B. Gilchrist, as general guardian of the property of Gloria L. M. Vanderbilt, an infant, appellant.

Mortimer M. Kassell and Harry T. O'Brien, Jr., for State Tax Commission, respondent.

OPINION—July 11, 1939

LEHMAN, J.:

Alice G. Vanderbilt died on April 22, 1934. Her "gross estate" was appraised at $10,120,907.17. Deductions of $766,319.32, allowed by statute, left a "net estate" of $9,354,587.85. A transfer tax measured by that "net estate" has been assessed. The decedent was the widow of Cornelius Vanderbilt, who died in September, 1899. By his will Cornelius Vanderbilt created a fund to provide an income of $250,000 to his wife during her lifetime. He directed that at the death of his wife "the principal set apart . . . to create the annual payment of two hundred and fifty thousand dollars to my wife, shall be given to our children, Gertrude, Alfred G., Reginald C. and Gladys Moore; and if any then be dead, to their issue, in such proportions and amounts as my said wife may direct or appoint in her last Will and Testament, and in default of such appointment the

same shall be divided among our said four children equally, share and share alike, the issue of any such child or children to take its parent's share, per stirpes and not per capita." The decedent Mrs. Vanderbilt exercised the power of appointment conferred upon her. At her death the fund which was subject to that power was appraised at $5,935,572.07, and the full amount was included in the decedent's taxable estate by the tax appraiser. This, the appellants contend, was error.

By the exercise of her power of appointment the decedent gave to one daughter and the issue of a deceased son far [fol. 179] more than they would otherwise have received under the will of Cornelius Vanderbilt, thus correspondingly reducing the amount which the other daughter and the issue of the other son would have received if she had failed to exercise her power. The legatees, who received less through the exercise of the power than they would otherwise have received, have asserted a right to elect to take under the will of the creator of the power. The Surrogate has sustained their right to such election and the State does not challenge that ruling. Their legacies, then, are taxable, if at all, as part of the estate of Cornelius Vanderbilt, the donor of the power, and the amounts which they have received have been eliminated from the gross estate of Mrs. Vanderbilt, the donee of the power. (Cf. Matter of Duryea, 277 N. Y. 310.) Upon this appeal the question is whether the shares of the trust fund passing to the other daughter and grandchildren in accordance with the exercise of the power of appointment by the donee of the power were properly included in the gross estate of Mrs. Vanderbilt subject to tax as part of her estate. The shares so included constitute the major portion of the trust fund and more than half of the estate of Mrs. Vanderbilt, the donee of the power.

The property which was included in Mrs. Vanderbilt's estate did not at any time belong to her. It did not at her death pass from her to those whom she appointed to take. Her power of appointment was not general. By its exercise she could obtain no benefit for herself, her creditors or her estate. During her life the fund was held by trustees under the terms of the will of Cornelius Vanderbilt. She enjoyed under his will a life interest in the fund, and a tax measured by the value of that life interest was paid upon the death of Cornelius Vanderbilt. The remainder, which

would vest in others upon her death, was not included in the tax assessed upon the transfer of his property. Mrs. Vanderbilt might, by exercise of her power of appointment, determine the shares which members of a limited group defined by the will of Cornelius Vanderbilt should receive out of property in the estate of Cornelius Vanderbilt and held by trustees under his will. When she exercised that power she gave her appointees nothing which belonged to her and she relinquished no rights which she might have asserted for herself. Nevertheless, the transfer of that property has been taxed in her estate and not in the estate of Cornelius Vanderbilt. The tax so imposed is many times greater than it would have been if the transfer had been taxed in the estate of the donor of the power. The appellants maintain that the Tax Law (Cons. Laws, ch. 60), properly construed, does not authorize the inclusion in the taxable estate of Mrs. Vanderbilt of property which was in [fol. 180] no real sense a part of her estate, and that the Legislature could not authorize its inclusion without violation of restrictions placed by the Constitution of the United States upon the legislative power. The questions raised require a detailed statement and analysis of the history of the statutes of the State imposing death duties and of the proceedings had in fixing the tax upon the estate of Cornelius Vanderbilt in accordance with the statute in effect at his death.

The Tax Law then in effect (Laws of 1896, ch. 908), as amd. by Laws of 1897, ch. 284) provided that "a tax shall be and is hereby imposed upon the transfer of any property * * * in the following cases;

"1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state. * * *

"5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exer-

cise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure." (§ 220, subds. 1 and 5.)

We are concerned primarily with those provisions of the statute which might apply to taxation of transfers of property effected through the exercise of a power of appointment by the donee of the power. We are not concerned with those provisions of the statute which might apply where there has been failure to exercise such a power.

Thus when the tax was assessed on the estate of Cornelius Vanderbilt though the life estate passing under the testator's will to his wife was at that time subject to a tax as part of his estate, the transfer of the fund at the death of his wife, either by her exercise of the power of appointment conferred upon her or, upon her failure to exercise that power, in accordance with the terms of the will of the donor [fol. 181] of the power was declared by the statute to be taxable only at the date of the death of the donee of the power "in the same manner as though the property * * * belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will." The statute, it is clear, is not intended to draw any distinction between general powers of appointment and special or non-beneficial powers. It applies to every form of power. It was so construed and applied in assessing the tax upon the transfer of the estate of Cornelius Vanderbilt, and we are not referred to any case in which any other construction was urged "where there is an absolute gift of a power of appointment." (Cf. Matter of Burgess, 204 N. Y. 265, 270.) Such an absolute gift of a power of appointment was made here. Even though choice by the donee of the power was limited to a small group of persons and there may have been a theoretical possibility that none of that group would be in existence at the time fixed for the exercise of that power, yet under all possible circumstances the property was "certain to pass under the exercise or non-exercise of the power of appointment," and, therefore, the transfer was

taxable in the estate of the donee. That would not be true where the gift of the power is to take effect only in contingencies which might never arise. In that respect this case differs from Matter of Burgess (supra), where the testator himself chose the persons to whom remainders should pass in certain contingencies, and conferred a power of appointment upon his trustees only if those contingencies did not arise. The property affected by the power contingently given was in that case included in the taxable estate of the donor of the power, for otherwise, if the contingency upon which the gift of the power was to become effective should not arise, the transfer would not, under the statute, have been subject to any tax.

It should perhaps be added that until 1930 there was little, if any, reason based on any practical consideration why there should be differentiation between general powers of appointment and limited or non-beneficial powers. All transfers of the property of residents of the State by will or by the intestate laws were to be taxed. Transfers effected directly by the will of the resident owner were, of course, to be taxed in the estate of the testator; transfers effected by exercise of a power of appointment conferred by such will were to be taxed as if the property had belonged to the donee of the power. The rate of taxation was not then measured by the size of the decedent's estate and would not be affected by the provision of the statute that a transfer of that property by the exercise of a power of appointment should be taxed as part of the estate of the donee of the power rather than of the donor. That provision was, then, hardly more than a new and convenient rule of administra- [fol. 182] tion. Under earlier statutes, taxing transfers by decedents, this court had held that "where the donee of the power has the right of selection, the interest appointed vests in the appointee at the time of the appointment, but his title relates to and is acquired under the instrument creating the power," and is taxable as part of the estate of the donor. (Matter of Stewart, 131 N. Y. 274, 281.) Even then it was necessary to postpone assessment and collection of the tax until the death of the donee, for under the earlier statutes it was held, too, that contingent remainders, or remainders which, though technically vested, were defeasible, could not be taxed until they vested indefeasibly. (Matter of Curtis, 142 N. Y. 219; Matter of Burgess, supra.) By taxing transfers of property effected through exercise of a power of

appointment as if the property had belonged to the donee of the power rather than to the donor, the tax procedure was simplified, and at times the administration of the estate of the donor could be closed earlier than would otherwise have been possible.

The Tax Law was further amended by chapter 76 of the Laws of 1899 so as to provide: "When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article." (§ 230.) In accordance with these provisions, which went into effect a short time before the death of Cornelius Vanderbilt, contingent estates or interests created by his will were taxed tentatively at the highest possible rate. (Matter of Vanderbilt, 172 N. Y. 69.) Such contingent estates then taxable did not, however, include any estate or interest in the trust fund to which Mrs. Vanderbilt's power of appointment related, for in construing the statute this court had held that "it is the exercise of the power * * * which effects the transfer which the statute makes taxable," and that section had no application in such case. (Matter of Howe, 86 App. Div. 286, 288; affd. on opinion below, 176 N. Y. 570.)

The State regulates succession to a decedent's property. It permits an owner to provide by will to whom his property shall be transferred upon his death. He may appoint the person to whom the property shall go or he may give to another a power of appointment to be exercised at some future time. If the donee of the power is given a life interest in the property and a general power of appointment which he may exercise for his own benefit, his rights of enjoyment and control are closely analogous to the rights of an owner. Even then, however, it remains theoretically [fol. 183] true that the property does not become his and by exercise of the power of appointment he transfers to the appointee a title which relates back to the instrument creating the power.

The statutory rule ignores all such theoretical considerations when it requires that a transfer effected through exercise of the power of appointment shall be taxed "in

the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will." The statutory rule was, nevertheless, based soundly upon practical considerations which the Legislature decided should control. "Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it." (Matter of Dows, 167 N. Y. 227, 231; affd. sub nom., Orr v. Gilman, 183 U. S. 278.) For that reason this court held that a tax may be imposed upon a transfer effected through exercise of the power, and that is true though "there was no statute imposing a succession tax of any kind in force when the original disposition of the property was made and the power was created. That transfer is not taxed, and the statute makes no effort to reach it. It is the practical transfer through the exercise of the power by will that is taxed and nothing else." (Matter of Delano, 176 N. Y. 486, 494.) In affirming that decision the Supreme Court of the United States pointed out that: "It may be that the donee had no interest in the estate as owner, but it took her act of appointment to finally transfer the estate to some of the class and take it from others. Notwithstanding the common-law rule that estates created by the execution of a power take effect as if created by the original deed, for some purposes the execution of the power is considered the source of title." (Chanler v. Kelsey, 205 U. S. 466, 474.) The statutory rule treating the execution of the power as the real source of title is, therefore, not arbitrary; at least, so long as the tax is not measured by the size of the estate of the person who makes the transfer. Mere postponement of the assessment of the tax is not a ground for complaint to the court. That is true even though the rate of taxation might be changed in the interval between the death of the donor of the power and the death of the donee or even though in the interval the tax laws were so amended that transfers previously not taxable were subjected to a tax. (Matter of Dows, supra.) Indeed, the appellants do not claim invalidity of the statutory rule on such ground; they claim it is invalid as applied in this case on grounds which we shall hereafter consider.

[fol. 164] We point out here, again, that we are concerned only with a transfer effected by the exercise of a power of

appointment, not with any transfer upon failure to exercise such power. A statutory rule that whenever the donee of a power shall omit or fail to exercise it, a transfer shall be deemed to take place as though the persons becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power taking effect at the time of such omission or failure, is without any foundation either in fact or in theory. In such case the donee of the power transfers nothing to the person who succeeds to the property of the donor of the power in accordance with the will of the donor or the intestacy laws in effect at his death. Therefore, this court held that the part of the statute was invalid which purported to tax in that manner succession to property through failure to exercise a power. (Matter of Lansing, 182 N. Y. 238.) That decision did not affect the provisions of the Tax Law for the taxation of transfers through exercise of the power. To conform to that decision the Legislature then amended section 220 of the Tax Law by omitting the provision for the taxation of transfers upon failure to exercise a power of appointment but left intact the provision for taxation of transfers effected through exercise of a power. (Laws 1911, ch. 732.) That provision is still part of the Tax Law (§ 220, subd. 4), though no longer applicable to persons dying on or after September 1, 1930.

It thus appears plain that the transfer of the fund, created by the will of Cornelius Vanderbilt, to provide an income for his wife during her lifetime, which took effect at her death, was not subject to a death tax in the estate of Cornelius Vanderbilt, because at the time of his death the statute provided that the tax on such a transfer, effected by exercise of a power of appointment, should be imposed in the estate of the donee of the power. It would have been imposed in the estate of Mrs. Vanderbilt, the donee of the power, if she had died before September, 1930, and no effective challenge could have been made to a tax so imposed. Prior to her death, however, the Legislature, by chapter 710 of the Laws of 1930, added article 10-C to the Tax Law, which substituted, in respect to persons dying after it took effect, an estate tax similar to the Federal estate tax (in place of the tax imposed by the earlier statute which we have described as an inheritance tax; Matter of Cregan, 275 N. Y. 337). That involves, it has been said,

a "distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death." (Knowlton v. Moore, 178 [fol. 185] U. S. 41, at p. 77.) The older inheritance tax might be described as a tax on the privilege of receiving property on the death of another, and the new estate tax as a tax on the privilege of transmitting property upon death. (Coolidge v. Long, 282 U. S. 582.) These differences are not merely theoretical. They may carry practical consequences. The rate of the older inheritance tax was measured by the size of the interest received by the individual; the rate of the estate tax is measured by the size of the estate left by the decedent passing to few or many in accordance with the decedent's will or the intestacy laws. An inheritance tax, measured by the size of the interest received by an individual through the exercise of a power of appointment, though imposed in the estate of the donee of the power as if the transfer had been made by the donee of the property owned by him, produces no arbitrary inequality even where the power of appointment is a non-beneficial power and refers to property never owned by the donee. An estate tax measured by the size of the estate transmitted to others upon the owner's death might, however, produce unjust inequality if the law arbitrarily includes for such purpose any property which is in no real sense a part of the estate in which it is taxed. Accordingly, though the earlier "inheritance tax" statutes made no distinction between transfers effected through exercise of a general power of appointment and transfers effected through exercise of a limited or non-beneficial power, the statute of 1930 modelled upon the Federal estate tax laws incorporated a distinction previously drawn in the Federal statutes between transfers made through the exercise of "general" powers of appointment and transfers through the exercise of limited powers. It provided that the value of the gross estate of a decedent subject to the tax shall include the value of "any property passing under a *general* power of appointment exercised by the decedent." (§ 249-r, subd. 7.) The value of property passing under a limited power of appointment would thereafter be included in the value of the estate, subject to tax, of the donor of the power.

That left a gap in the Tax Law, through which a transfer effected thereafter by exercise of a limited power of appointment created by will of a testator dying before the statute

took effect would escape all taxation. To fill in that gap the Legislature, by chapter 320 of the Laws of 1932, added subdivision 7-a to section 249-r to provide that the value of the gross estate of a person dying thereafter should include the value of all property "passing under a power of appointment exercised by the decedent (a) by will, or (b) by deed * * * intended to take effect in possession or enjoyment at or after, his death, * * * provided that [fol. 186] the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof."

It is plain that the purpose of the new subdivision was to restore the old rule that a transfer of property under a limited power of appointment exercised by a decedent should be taxed in the estate of the grantee of the power, in the small class of cases where otherwise the transfer would escape taxation. In those cases, the rule formulated in respect to an inheritance tax is to be applied now to an estate tax where the rate is measured by the size of the estate of the grantee of the power; and we are told that where, as in this case, the grantee did not own the property and the power of appointment could not be exercised by the grantee for his own benefit, such a tax produces a result so arbitrary and unjust that it would violate the provisions of the Fourteenth Amendment of the Constitution. At least, it is said, the validity of such a tax would be so doubtful that the statute should be construed in manner which would avoid the doubt.

We are urged for that reason to limit the words "property passing under a power of appointment" to property in which the decedent had or could acquire a beneficial interest, and for analogy and precedent we are referred to a series of cases in the Federal court exemplified by Helvering v. Parker (84 Fed. Rep. [2d] 838), where the courts have held that the Federal Estate Tax Law (§ 302-g; U. S. Code, tit. 26, § 411, subd. [g]), requiring the inclusion, in a decedent's taxable estate, of the proceeds of life insurance policies "taken out by the decedent upon his own life" did not apply where the insured reserved no right to surrender and cancel the policies, to pledge them for loans or to dispose of their proceeds for his own benefit during his life

and no other beneficial right incidental to ownership or control. (Cf., also, Reinecke v. Northern Trust Co., 278 U. S. 339; Helvering v. Holmholtz, 296 U. S. 93; White v. Poor, 296 U. S. 98.)

"A statute must be construed, *if fairly possible*, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." (United States v. Jin Fuey Moy, 241 U. S. 394, 401; cf. Knowlton v. Moore, supra, at p. 77.) Tax statutes "*in case of doubt* • • • are construed most strongly against the Government, and in favor of the citizen." (Gould v. Gould, 245 U. S. 151, 153.) (Italics in both cases are ours.) Here, however, the purpose of the statute is clearly expressed and the construction urged upon us is not "*fairly possible.*" The original statute made no distinction between beneficial or general power and [fol. 187] limited or non-beneficial powers. The new statute does make the distinction between "general" powers and other powers, but it is clear that a transfer under any power of appointment, not general, which was taxable under the old statute in the estate of the donee of the power is intended to be so taxable also under subdivision 7-a of section 249-r. We cannot give to the statute a more limited application. If the subdivision does not apply in this case the passing of title to this property will escape taxation. That was not the legislative intent.

The serious question in this case is whether the tax violates the Constitution of the United States. The State has a broad power of taxation, but in the exercise of that power it may not provide a measure for a tax which is entirely arbitrary and which produces inequality and injustice so great as to deprive a taxpayer of the equal protection of the law. So it has been held that "a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment." (Heiner v. Donnan, 285 U. S. 312, 325.) Taxation, it has often been pointed out, is an intensely practical matter. The Legislature may not arbitrarily fix the measure of a tax by a fiction. (Hoeper v. Tax Commission, 284 U. S. 206.) Always there must be some reason based on fact, not fiction, for imposing a particular tax upon a particular class, and absence of any basis for the classification may not be hidden by an arbitrary creation of a conclusive presumption. (Schlesinger v. Wisconsin, 270 U. S. 230.)

The Supreme Court has authoritatively stated the rule which in such cases creates invalidity: "a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment." A statutory rule is beyond the power of the Legislature if the result would be "that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in fact by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description." (Heiner v. Donnan, supra, p. 327; cf. Nichols v. Coolidge, 274 U. S. 531; Frew v. Bowers, 12 Fed. Rep. [2d] 625.)

The standard of what is arbitrary and unreasonable is not rigid. As we have often pointed out, the question is usually one of degree. A difference in the facts, seemingly [fol. 188] slight; an emphasis on one factor rather than another, may produce varying results. Even in the cases cited there was division of opinion in the court, though the difference of opinion concerned only the application of the general rule. The rules are too well established to be challenged. The facts present in this case are so different from those presented in the cited cases that they furnish at best imperfect analogies.

In considering the validity of the tax three factors must constantly be kept in mind: the nature of the tax, the measure of the tax and its incidence. Perhaps repetition is unnecessary, but we again point out that the statute in effect at the death of Cornelius Vanderbilt imposed no tax upon an inchoate transfer of a decedent's property to be effected thereafter by exercise of a power of appointment. Under that statute and under the present statute "it is the practical transfer through the exercise of the power by will that is taxed and nothing else." (Matter of Delano, supra, p. 494.) In 1932, when the Legislature enacted subdivision 7-a of section 249-r, the "practical transfer" had not been made. The Legislature was free at that time to impose a tax upon such transfer by a decedent dying thereafter, even if the earlier tax statute had imposed no such tax. (Chanler v. Kelsey, supra.) The Legislature chose to lay an "estate" tax measured by the aggregate of the property which was in a practical sense transferred by the will

of the grantee of the power. Though the tax is paid out of the estate of the decedent, the Decedent Estate Law (Cons. Laws, ch. 13) provides that the tax so paid "shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues." (§ 124.) We may, therefore, properly assume that Mrs. Vanderbilt's appointees will ultimately bear the main burden of the tax in proportion to the property received.

Since an estate tax is an excise laid in respect to the privilege of transmitting property rights at death (Coolidge v. Long, supra), it can hardly be said that the statutory rule that the rate of the tax should be measured by the aggregate of the property so transmitted is entirely without basis in fact, even though the decedent did not own some of the property but merely had a limited power of appointment. In the cases cited by the appellants property was included in the aggregate which measured the tax, though it was not transmitted to others at the death by the decedent. In those cases death did not result "in a shifting, or in the completion of a shifting, * * * of any economic benefit of property, which is the subject of a death tax." (Heiner v. Donnan, supra, p. 323.) There, by arbitrary choice to include in the "estate" of the decedent property [fol. 189] which did not pass at the decedent's death to which the estate was in no way related and from which the estate derived no benefit, the Legislature increased the rate of taxation upon the transfer of property which the decedent owned and transmitted. In the case we are now considering, no property is included in the aggregate which measured the tax which does not pass at Mrs. Vanderbilt's death to persons who take the property only because she so provided in her will. True, the inclusion of that property in Mrs. Vanderbilt's estate increases the rate of the tax which must be paid ultimately by those to whom the property owned by Mrs. Vanderbilt was transferred, as well as the tax which must be paid ultimately by those who receive property over which she had a limited power of appointment. Argument may be made that such a tax is not fair; indeed, the fact that under the Federal statute only a transfer of property under a general power of appointment is taxed in the estate of the grantee of the power indicates that Congress believed that it is fairer, as a general rule, that transfer under limited powers should be taxed in the estate

of the grantor of the power. Such "unfairness" does not, however, render the statute invalid.

The ultimate burden of an estate tax rests upon the persons to whom the estate is transferred. Since the tax is measured by the total transferred to one or many, each pays a tax measured, not by the benefit he receives, but in some degree by the benefit others receive. Argument might be made that all estate taxes are to that extent unfair, but estate taxes are not open to challenge on such ground. The question is always whether the classification is reasonable; incidental hardship resulting from a reasonable classification is no ground of attack. If an estate tax upon the transfer through the exercise of the power of appointment by Mrs. Vanderbilt were imposed now in the estate of Cornelius Vanderbilt in accordance with provisions of Article 10-C, perhaps the tax would be as large as if imposed in the estate of Mrs. Vanderbilt. The great disparity in the amount of the tax imposed in the estate of Mrs. Vanderbilt and the amount of the tax if imposed in the estate of Cornelius Vanderbilt is due to the fact that a tax in the estate of Cornelius Vanderbilt would be measured in accordance with the statute in effect at his death, though, as we have pointed out, the tax is upon the transfer effected by Mrs. Vanderbilt's will and should be taxed in accordance with statutes in force at her death. Its inclusion in an estate tax, measured by the aggregate of the property transferred under her will, is not so unreasonable that it may be challenged in the courts.

The classification so made applies only to transfers under a limited power of appointment created by the will of a [fol. 190] person dying prior to September 1, 1930. Transfers under such powers created by persons dying thereafter would be subject to a tax measured in a different way—and such tax might be higher or lower but would not be the same. That, it is said, denies to the taxpayer the equal protection of the law. In urging that contention the appellants lean heavily on the case of Binney v. Long (299 U. S. 280). In that case the Legislature based discrimination upon whether a transfer was made before or after a date which it arbitrarily chose. In the instant case the discrimination is not based upon a date arbitrarily selected but is a logical solution by the Legislature of a problem which it was required to meet. The discrimination, as we have already said, is

between a transfer under a limited power of appointment theretofore granted and a transfer under such a power thereafter granted, and it was calculated to prevent transfers thereafter effected under powers theretofore granted from escaping all taxation. That is not an arbitrary discrimination.

Other objections raised by the appellants have been rejected after careful consideration. We do not extend this opinion further by detailed analysis.

The order of the Appellate Division should be affirmed, with costs.

O'Brien, Hubbs, Loughran, Finch and Rippey, JJ., concur; Crane, Ch. J., taking no part.

Order affirmed.

[fol. 191] In Surrogate's Court, County of New York

Present: Hon. James A. Foley, Surrogate

In the Matter of the Appraisal under the Estate Tax Law of the Estate of Alice G. Vanderbilt, Deceased

Order on Remittitur from the Court of Appeals—August 21, 1939

Appeals having been taken to the Court of Appeals in the above entitled proceeding as of right and also pursuant to leave granted by the Appellate Division of the Supreme Court, First Judicial Department by order made and filed in the office of the Clerk of said Appellate Division on the 16th day of December, 1938, by Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, deceased, and by said Cornelius Vanderbilt, individually, and by Gladys Szechenyi, and by Cathleen Vanderbilt Lowman, and by Gloria Laura Morgan Vanderbilt, infant, by Thomas B. Gilchrist, as General Guardian of the property of said infant, and by Thomas B. Gilchrist, as General Guardian of the property of said Gloria Laura Morgan Vanderbilt, infant, from the order of affirmance of the Appellate Division of the Supreme Court, First Judicial Department, made and entered in the office of the Clerk of said Appellate Division on the 28th day of October, 1938, which order unanimously affirmed, in so far as appealed from the final order [fol. 192] of the Surrogate's Court of the County of New

York entered in the office of the Clerk of said Surrogate's Court on the 28th day of September, 1937, and from the order of the Surrogate's Court of the County of New York made on the 29th day of November, 1938, and entered in the office of the Clerk of said Surrogate's Court on the 30th day of November, 1938, pursuant to said order of affirmance of said Appellate Division; and said appellants having appealed from the whole and each and every part of said order of affirmance of said Appellate Division and from the whole and each and every part of said order of said Surrogate's Court entered pursuant to said order of affirmance of said Appellate Division;

And, the Court of Appeals having duly heard said appeals, and, after due deliberation had thereon, having ordered and adjudged that the said order of the Appellate Division of the Supreme Court, First Judicial Department, be affirmed with costs, and the remittitur from the Court of Appeals, together with a certified copy of the said order of affirmance of the Court of Appeals, having been filed in the Court;

Now, upon motion of Jerome M. Hirsch, Esq., attorney for the respondent, State Tax Commission, it is

Ordered that the said order of the Court of Appeals dated the 11th day of July, 1939 be, and the same hereby is, made the order of this Court, and it is further

Ordered that, pursuant to the said order of the Court of [fol. 193] Appeals, the respondent, State Tax Commission, recover from the appellants the sum of $139.10, costs and disbursements as taxed.

James A. Foley, Surrogate.

Filed August 22, 1939.

[fol. 194] In Supreme Court of the United States

[Title omitted]

Order Allowing Appeal to the Supreme Court of the United States—Filed October 13, 1939

On this 10th day of October, 1939, on reading the petition for appeal in this cause to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York in the above entitled suit, entered

in said Court on July 11, 1939, and in the Surrogate's Court of the County of New York on August 22, 1939, which said petition was presented on October 10, 1939, and the assignment of errors and the prayer for reversal and the jurisdictional statement, presented by the appellants pursuant to the statutes of the United States and to the Revised Rules of the Supreme Court of the United States in such case made and provided,

[fol. 195] It is Ordered:

(1) that an appeal be and the same is hereby allowed to the Supreme Court of the United States in the above entitled cause, as provided by law;

(2) that the Clerk of the Surrogate's Court of New York County in the State of New York shall prepare and certify a transcript of the record and proceedings in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within forty days of this date; and

(3) that security for costs on appeal be fixed in the sum of $500.00, and the appellants having presented an undertaking in the sum of $500.00, executed by Fidelity and Deposit Company of Maryland, it is further ordered that such undertaking be and the same is hereby approved.

Done this 10th day of October, 1939.

Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

[fol. 196] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed October 13, 1939

To the Chief Judge of the Court of Appeals of the State of New York:

Your petitioners, Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the last will and testament of Alice G. Vanderbilt, deceased, and said Cornelius

Vanderbilt, individually, Gladys Szechenyi, Cathleen Vanderbilt Lowman, Gloria Laura Morgan Vanderbilt, infant, and Thomas B. Gilchrist, as general guardian of the property of said infant, the appellants above named, respectfully show:

1. This proceeding was instituted in the Surrogate's Court of the County of New York, in the State of New York, for the purpose of assessing the estate tax upon the [fol. 197] estate of Alice G. Vanderbilt, deceased, as provided by Article 10-C of Chapter 60 of the Consolidated Laws of New York (New York Tax Law). Upon the estate tax return and petition for appointment of an appraiser submitted by the executors, appellants herein, and upon the appraisal and report of the appraiser appointed by the Surrogate, a pro forma order assessing tax was entered in the Surrogate's Court of the County of New York on July 13, 1936. This order assessed the estate tax upon the estate of Alice G. Vanderbilt, deceased, inclusive of the value of certain property of the estate of Cornelius Vanderbilt, deceased, passing to the individual petitioners and others by the testamentary exercise by Alice G. Vanderbilt, deceased, of a special or limited power of appointment. Such inclusion of property passing by the exercise of a special or limited power of appointment, for the purpose of measuring and assessing the estate tax, was purportedly under and pursuant to the terms of subdivision 7-a of Section 249-r of said Article 10-C of the New York Tax Law.

2. Your petitioners duly took an appeal as of right from said pro forma taxing order to Surrogate James A. Foley, one of the Surrogates of the Surrogate's Court of the County of New York in the State of New York. Such appeal was instituted by your petitioners' several notices of appeal, in each of which it was expressly assigned as grounds of the appeal that the estate tax assessed under and pursuant to Article 10-C of the New York Tax Law, upon the taxable estate of Alice G. Vanderbilt, deceased, inclusive of the property or any part of the property over which said deceased exercised by her will the special or limited power of appointment granted to her by the will [fol. 198] of Cornelius Vanderbilt, was erroneous and illegal, for the reason that in so far as it purports to require the inclusion of said property or any part thereof in the gross estate of said deceased for the purpose of measuring,

fixing or determining the tax, said Article 10-C is unconstitutional and void in that it deprives the appellants of their property without due process of law and deprives them of the equal protection of the laws, in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States.

3. Upon hearing such appeal Surrogate Foley made a decision based upon a written opinion filed June 7, 1937, which is reported in 163 Misc. 667, which opinion shows that the said Surrogate overruled the appeal of your petitioners in so far as they contended that said Article 10-C was unconstitutional upon the points assigned in their notices of appeal. Following such decision Surrogate Foley made an order dated and entered in the Surrogate's Court September 28, 1937, modifying the said pro forma order and assessing the estate tax upon the estate of Alice G. Vanderbilt, deceased, inclusive of the aforesaid appointed property to the value of $5,285,572.07, (and exclusive of $650,000 of the aforesaid appointed property which was appointed to persons other than your individual petitioners) and overruled the aforesaid grounds of appeal. Said order, among other things,

"Ordered and Adjudged that the provisions of subdivision 7-a of Section 249-r of Article 10-C of the Tax Law, in so far as the provisions thereof are hereby held to be applicable to the trust fund created by the Seventh Article of the will of said Cornelius Vanderbilt, deceased, over which the decedent Alice G. Vanderbilt exercised by Article Third of her will the special or limited power of appointment granted to her by the Eighth Clause of said will of Cornelius Vanderbilt are valid and constitutional and do not violate Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States or Article I, Section 6 of the Constitution of the State of New York; and [fol. 199] that the inclusion of the value of said trust fund to the extent herein directed in the gross estate of said Alice G. Vanderbilt, deceased, for the purposes of assessing, fixing and determining the estate tax upon the estate of said Alice G. Vanderbilt, deceased, does not violate Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States or Article I, Section 6 of the Constitution of the State of New York, * * *."

4. Your petitioners duly took an appeal as of right from said order to the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department, by their several notices of appeal from each and every part of said order of the Surrogate's Court (except such part thereof as sustained the appeals to the Surrogate and excluded $650,000 of said appointed property passing to others than your individual petitioners). Upon hearing said appeal the Appellate Division, upon its unanimous decision without written opinion, entered an order on October 28, 1938, affirming the order of the Surrogate appealed from. The Appellate Division remitted the proceeding to the Surrogate's Court of the County of New York, whereupon an order dated November 29, 1938, was entered in the said Surrogate's Court on November 30, 1938, making the said order of affirmance of the Appellate Division the order of said Surrogate's Court.

5. Thereafter, as provided by Section 588, subdivision 1 of the Civil Practice Act of the State of New York, your petitioners duly took an appeal as of right upon the constitutional questions, from said order of the Appellate Division, to the Court of Appeals of the State of New York, which is the highest court in the State of New York in which a decision in this cause could be had. Such appeal was instituted by your petitioners' several notices of appeal from each and every part of the order of affirmance of the Ap-
[fol. 200] pellate Division, and such appeal directly presented to the Court of Appeals the Federal questions herein sought to be reviewed by the Supreme Court of the United States, which questions are detailed in the assignment of errors presented herewith. Concurrently, pursuant to leave granted by the Appellate Division in an order entered December 16, 1938, and by separate notices of appeal, your petitioners appealed by leave of that court. The appeal as of right and the appeal by leave were argued in the Court of Appeals as one appeal, on February 27, 1939.

6. On July 11, 1939, the Court of Appeals handed down an opinion written by Judge Lehman, in which all other Judges taking part in the case concurred, in favor of the constitutional validity of the statute in question. This opinion is reported in 281 N. Y. 297. Said opinion shows that the Court of Appeals decided the Federal questions against

the contentions of your petitioners and in favor of the constitutional validity of the statute in question.

7. In pursuance of said decision of the Court of Appeals a final judgment of affirmance of the order of the Appellate Division was entered in the Court of Appeals on July 11, 1939. This final judgment duly remitted the record and judgment in the cause to the Surrogate's Court of the County of New York, there to be proceeded upon according to law. Such remittitur was thereafter duly filed in the said Surrogate's Court, whereupon an order was made by said Surrogate's Court on August 21, 1939, and entered on August 22, 1939, making the order of affirmance of the Court of Appeals the order of the Surrogate's Court of the County of New York.

8. By the said final judgment of the Court of Appeals of the State of New York, and the said order of the Surro- [fol. 201] gate's Court entered on August 22, 1939, the order of the Surrogate's Court of the County of New York dated and entered the 28th day of September, 1937, stands affirmed by the highest court of the State of New York in which a decision in the suit could be had, and the Surrogate's Court of the County of New York in the State of New York has possession of the record of the proceedings in the cause.

9. In accordance with Section 237 (a) of the Judicial Code of the United States, as amended [28 U.S.C.A. § 344 (a)] and Section 1 of the Act of Congress of January 31, 1928 [c. 14, 45 Stat. 54] as amended by the Act of April 26, 1928 [c. 440, 45 Stat. 466] and in accordance with the Revised Rules of the Supreme Court of the United States, your petitioners respectfully show that the cause is one in which a review can be had in the Supreme Court of the United States, as a matter of right, in that a final judgment has been rendered in the highest court of the State of New York in which a decision in the suit could be had, the validity of a statute of the State of New York was drawn in question on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

10. The errors upon which your petitioners are entitled to an appeal are more fully set forth in the assignment of

errors presented herewith pursuant to the Revised Rules of the Supreme Court of the United States; and there is likewise presented herewith, pursuant to said Rules, a statement as to the jurisdiction of the Supreme Court of the United States in this cause.

Wherefore, your petitioners pray for the allowance of an appeal in the above entitled cause from the said judgment of the Court of Appeals of the State of New York to the Supreme Court of the United States, in order that the [fol. 202] said judgment may be examined and reversed, and also pray that a transcript of the record, proceedings and papers in this cause duly authenticated by the Clerk of the Surrogate's Court of the County of New York in the State of New York, under his hand and the seal of said court, may be sent to the Supreme Court of the United States as provided by law, that an order be made touching the security to be required of your petitioners, and that the bond tendered by your petitioners be approved.

Dated, October 10, 1939.

Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, deceased, and said Cornelius Vanderbilt, individually, Appellants, petitioners, by Roy C. Gasser, their counsel; Office and Post Office Address: 20 Pine Street, New York, N. Y. Gladys Szechenyi, Appellant, Petitioner, by Arthur A. Ballantine, her counsel; Office and Post Office Address: 31 Nassau Street, New York, N. Y. Cathleen Vanderbilt Lowman, Appellant, Petitioner, by Horace R. Lamb, her counsel; Office and Post Office Address 15 Broad Street, New York, N. Y. Gloria Laura Morgan Vanderbilt, [fol. 203] infant, Appellant, Petitioner, by Thomas B. Gilchrist, as General Guardian of her property, by Thomas B. Gilchrist, her counsel. Thomas B. Gilchrist, as General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant, Appellant, Petitioner, Thomas B. Gilchrist, his counsel; Office and Post Office Address: 14 Wall Street, New York, N. Y.

[fol. 204] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed October 13, 1939

Now comes Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the last will and testament of Alice G. Vanderbilt, deceased, and said Cornelius Vanderbilt, individually, Gladys Szechenyi, Cathleen Vanderbilt Lowman, Gloria Laura Morgan Vanderbilt, infant, and Thomas B. Gilchrist, as general guardian of the property of said infant, appellants herein, and in connection with their petition for appeal to the Supreme Court of the United States, make and file this assignment of errors herein, to wit, that the Court of Appeals of the State of New York erred:

1. In affirming the order of the Appellate Division of the Supreme Court of the State of New York in and for the First Judicial Department.

[fol. 205] 2. In failing to hold that the statute of the State of New York, to wit, Article 10-C of Chapter 60 of the Consolidated Laws of New York, under which the tax involved in this suit was assessed, and particularly subdivision 7-a of Section 249-r thereof, is void as in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that the aforesaid statute imposes an estate tax upon the estate of Alice G. Vanderbilt, deceased, which is measured by including the value of property which said deceased did not own at the time of her death and had never owned, and in which said deceased had never had, either at the time of her death or at any other time, any beneficial or proprietary rights or interest whatsoever, the sole connection of said deceased with such property having been that she had and exercised a special or limited and wholly non-beneficial power of testamentary appointment over such property; and thereby deprives the appellants of property without due process of law.

3. In failing to hold that the aforesaid statute is repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that the afore-

said statute imposes an estate tax upon the estate of Alice G. Vanderbilt, deceased, which is measured by progressive rates applied to the aggregate of the value of the property owned by the deceased together with the value of property appointed by said deceased, pursuant to a special or limited and wholly non-beneficial power of appointment, such appointed property being property which the said deceased had never owned and in which the said deceased at no time had had any beneficial or proprietary rights or interest whatsoever; and thereby deprives the appellants of property without due process of law.

[fol. 206] 4. In failing to hold that the aforesaid statute is repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that the aforesaid statute imposes an estate tax upon the estate of Alice G. Vanderbilt, deceased, which is larger than the tax imposed on the estate of a decedent in all respects identical with the estate of said deceased, except for a difference having no just or reasonable relation to the objects of an estate tax statute, such difference being merely the absence of, or the failure to exercise, a special or limited and non-beneficial power of appointment over the property of another person; and thereby discriminates against the appellants and denies to the appellants the equal protection of the laws.

5. In failing to hold that the aforesaid statute is repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that the aforesaid statute makes the imposition of the estate tax imposed by such statute depend upon the question whether the appointed property involved was or was not subject to a death tax in the estate of the grantor of the power of appointment, irrespective of the kind or amount of such death tax in the grantor's estate, and such attempted classification between those subject to the tax and those not subject to the tax is arbitrary and capricious; and thereby discriminates against the appellants and denies to the appellants the equal protection of the law.

6. In failing to hold that the aforesaid statute is repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that the aforesaid statute requires the amount of the estate tax assessed

upon the estate of Alice G. Vanderbilt, deceased, to be [fol. 207] measured by including the value of property appointed by said deceased in her will pursuant to a special or limited power created and conferred by the will of Cornelius Vanderbilt taking effect in 1899, whereas neither the aforesaid statute nor any statute of New York applies in like wise with respect to special or limited powers created and conferred by wills taking effect after September 1, 1930, the aforesaid statute providing in effect that it applies with respect to special or limited powers created and conferred by wills taking effect prior to September 1, 1930, but not to such powers created and conferred by wills taking effect after September 1, 1930; and thereby discriminates against the appellants and denies to the appellants the equal protection of the laws.

7. In failing to hold that the aforesaid statute is repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that the aforesaid statute requires the amount of the estate tax assessed upon the estate of Alice G. Vanderbilt, deceased, to be measured by progressive rates applied to the aggregate of the value of the property owned by the deceased together with the value of the property appointed by said deceased pursuant to a special or limited power of appointment created and conferred by the will of Cornelius Vanderbilt taking effect in 1899, whereas neither the aforesaid statute nor any statute of New York applies in like wise with respect to special or limited powers which were created and conferred by wills taking effect after September 1, 1930, the aforesaid statute providing in effect that the value of property appointed by a decedent pursuant to a special or limited power of appointment created and conferred by a will taking effect prior to September 1, 1930 shall be aggregated with the value of the decedent's own property [fol. 208] for the purpose of computing the estate tax imposed by such statute, but shall not be so aggregated where the special or limited power of appointment was created or conferred by a will taking effect after September 1, 1930; and thereby discriminates against the appellants and denies to the appellants the equal protection of the laws.

For which errors the appellants, Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the last will and testament of Alice G. Vanderbilt, deceased, and

said Cornelius Vanderbilt, individually, Gladys Szechenyi, Cathleen Vanderbilt Lowman, Gloria Laura Morgan Vanderbilt, infant, and Thomas B. Gilchrist general guardian of the property of said infant, pr. that the final judgment of the Court of Appeals of the State of New York be reversed and a judgment rendered in favor of the said appellants, and for costs.

Dated, October 10, 1939.

Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, deceased, and said Cornelius Vanderbilt, individually, Appellants, petitioners, by Roy C. Gasser, their counsel, Office and Post Office Address, 20 Pine Street, New York, N. Y. Gladys Szechenyi, Appellant, Petitioner, by Arthur A. Ballantine, her counsel, Office and Post Office Address, 31 Nassau Street, New York, N. Y. [fol. 209] Cathleen Vanderbilt Lowman, Appellant, Petitioner, by Horace R. Lamb, her counsel, Office and Post Office Address, 15 Broad Street, New York, N. Y. Gloria Laura Morgan Vanderbilt, infant, Appellant, Petitioner, by Thomas B. Gilchrist, as General Guardian of her property, by Thomas B. Gilchrist, her counsel. Thomas B. Gilchrist, as General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant, Appellant, Petitioner, Thomas B. Gilchrist, his counsel, Office and Post Office Address, 14 Wall Street, New York, N. Y.

[fols. 210-273] [File endorsement omitted.]

[fol. 274] In Supreme Court of the United States

[Title omitted]

Præcipe for Transcript of Record—Filed October 13, 1939

To the Clerk of the Surrogate's Court of the County of New York, State of New York:

Please incorporate the following portions of the record in the transcript on the appeal to the Supreme Court of the United States heretofore prayed by Gertrude Vanderbilt

Whitney and Cornelius Vanderbilt, as executors of the last will and testament of Alice G. Vanderbilt, deceased, and said Cornelius Vanderbilt, individually, Gladys Szechenyi, Cathleen Vanderbilt Lowman and Gloria Laura Morgan Vanderbilt, infant, and Thomas B. Gilchrist, as General Guardian of her property, from the final order in the above-entitled suit:

[fol. 275] 1. The entire record in the Court of Appeals.

2. The remittitur of the Court of Appeals dated July 11, 1939.

3. The opinion of the Court of Appeals dated July 11, 1939.

4. The order of the Surrogate's Court of the County of New York, dated August 21, 1939 and entered August 22, 1939, making the order of the Court of Appeals its order.

5. The petition for allowance of appeal.

6. The assignment of errors and prayer for reversal.

7. The order allowing appeal.

8. The bond for costs on appeal.

9. The jurisdictional statement filed under Rule 12 of the Revised Rules of the Supreme Court of the United States.

10. The proof of service of the petition for appeal, assignment of errors and prayer for reversal, jurisdictional statement, and order allowing appeal, together with statement calling appellee's attention to paragraph 3 of Rule 12 of said Revised Rules.

11. Citation on appeal, with proof of service.

12. This præcipe with proof of service.

Dated, October 11, 1939.

Roy C. Gasser, Counsel for Appellants, Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, deceased and said Cornelius Vanderbilt, individually. Arthur A. Ballantine, Counsel for Appellant, Gladys Szechenyi. Horace R. [fol. 276] Lamb, Counsel for Appellant, Cathleen Vanderbilt Lowman. Thomas B. Gilchrist, Counsel for Appellant, Gloria Laura Morgan Vanderbilt, infant. Thomas B. Gilchrist, As General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant, Appellant.

[fols. 277-279] [File endorsement omitted.]

[fol. 280] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed December 2, 1939

To the Clerk of the Supreme Court of the United States:

Come Now the appellants, pursuant to Paragraph 9 of Rule 13 of the Revised Rules of this Court, and adopt their assignment of errors as their statement of points to be relied upon, and represent that the whole of the record, as filed, is necessary for the consideration of said points, except the following portions thereof which should be omitted in printing:

1. Statement under Rule 234 (pages 1-2, folios 1-4).
2. Pages 73-116, inclusive, of the transcript.
3. Pages 156-158, inclusive, of the transcript.

[fol. 281] 4. Pages 171-172, inclusive, of the transcript.

5. Proof of service of order allowing appeal, petition for appeal, assignment of errors and prayer for reversal (pages 210-211).

6. Proof of service of jurisdictional statement (pages 259-260).

7. Proof of service of statement under Rule 12(2) (pages 263-264).

8. Bond on appeal (pages 265-266).

9. Citations on appeal, with proofs of service (pages 267-273).

10. Proof of service of praecipe (pages 277-278).

11. Proof of service of motion to dismiss or affirm (pages 286-287).

12. Clerk's certificate.

Dated, November 21, 1939.

Roy C. Gasser, Counsel for Appellants, Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, deceased, and said Cornelius Vanderbilt, individually. Arthur A. Ballantine, Counsel for Appellant, Gladys Szechenyi. Horace R. Lamb, Counsel for Appellant, Cathleen Vanderbilt Lowman. Thomas B. Gilchrist, Counsel for Appellant, Gloria Laura Morgan Vanderbilt, infant. Thomas B. Gilchrist, As General Guardian of the property of Gloria Laura Morgan Vanderbilt, infant, Appellant.

[fol. 282] [File endorsement omitted.]

Endorsed on cover: File No. 43,948. New York, Surrogate's Court, County of New York. Term No. 541. Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, Deceased, et al., appellants, vs. State Tax Commission of the State of New York. Filed November 18, 1939. Term No. 541, O. T., 1939.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 541

GERTRUDE VANDERBILT WHITNEY AND CORNELIUS VANDERBILT, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ALICE G. VANDERBILT, DECEASED, ET AL.,

Appellants,

vs.

STATE TAX COMMISSION OF THE STATE OF NEW YORK.

APPEAL FROM THE SURROGATE'S COURT OF NEW YORK COUNTY OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

ROY C. GASSER,
ARTHUR A. BALLENTINE,
HORACE R. LAMB,
THOMAS B. GILCHRIST,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 541

GERTRUDE VANDERBILT WHITNEY AND CORNELIUS VANDERBILT, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ALICE G. VANDERBILT, DECEASED, AND SAID CORNELIUS VANDERBILT, INDIVIDUALLY, GLADYS SZECHENYI, CATHLEEN VANDERBILT LOWMAN, GLORIA LAURA MORGAN VANDERBILT, INFANT, AND THOMAS B. GILCHRIST, AS GENERAL GUARDIAN OF THE PROPERTY OF SAID INFANT,

against *Appellants,*

STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellee.

JURISDICTIONAL STATEMENT.

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, appellants submit herewith their statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain the appeal in the above-entitled cause.

(1) The statutory provisions which sustain the jurisdiction of the Supreme Court of the United States to entertain the appeal in this case are Section 237(a) of the Judicial

Code of the United States, as amended (28 U. S. C. A. § 344 (a)) and Section 1 of the Act of Congress of January 31, 1928 (c. 14, 45 Stat. 54), as amended by the Act of Congress of April 26, 1928 (c. 44, 45 Stat. 466), which provide that the Supreme Court of the United States may review, upon appeal, a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

(2) The statute of the State of New York, the validity of which is drawn in question in this case, is Article 10-C of the New York Tax Law (Laws of 1909, c. 62, constituting Chapter 60 of the Consolidated Laws of New York, as amended by Laws of 1930, c. 710, and as amended by Laws of 1932, c. 320), and in particular, subdivision 7-a of Section 249-r of said Article 10-C. Section 249-n of said Article 10-C imposes a tax upon the transfer of the net estate of every person dying after the effective date of said Article 10-C (September 1, 1930), who at the time of death was a resident of the State of New York. Section 249-r of said Article 10-C prescribes the manner of determining the value of the gross estate of the decedent, the introductory portion of such Section 249-r being as follows:

> "§ 249-r. Gross Estate. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated (except real property situated and tangible personal property having an actual situs outside this state):"

Subdivision 7 of Section 249-r requires the inclusion of property passing under a general power of appointment

exercised by the decedent. Then follows subdivision 7-a, which reads as follows:

> "7-a. To the extent of any property passing under a power of appointment exercised by the decedent (a) by will, or (b) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth, exclusive of property the value of which is required to be included in the gross estate pursuant to paragraph numbered seven of this section, and provided that the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise therof."

The full text of Section 249-r of said Article 10-C is annexed hereto as Exhibit A.

Said Article 10-C, as originally enacted in 1930, was modeled upon the Federal Estate Tax Law. It contained subdivision 7, corresponding to a provision in the Federal Estate Tax Law, requiring the inclusion in the taxable estate of property passing under general powers of appointment; but it did not contain subdivision 7-a, which has no counterpart in the Federal Estate Tax Law. Such subdivision 7-a was enacted separately in 1932 as an amendment to said Article 10-C.

(3) The decision and final judgment and order of affirmance of the Court of Appeals was entered July 11, 1939. The order of the Surrogate's Court on the remittitur of the Court of Appeals was entered August 22, 1939. The application for an appeal herein is presented on this 10th day of October, 1939, to the Hon. Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

(4) For a statement of the nature of the case and the rulings of the State courts, and the basis upon which it is contended that this Court has jurisdiction of the cause under Section 237(a) of the Judicial Code, the appellants respectfully show:

This is a proceeding for the assessment of estate tax upon the estate of Alice G. Vanderbilt, deceased, late a resident of the State of New York, under Article 10-C of the New York Tax Law (Consolidated Laws of New York, c. 60). Said deceased, hereafter called the decedent, died testate on April 22, 1934. By her will she carried out a trust imposed on her by the will of her husband Cornelius Vanderbilt, by exercising a special or limited power of appointment over property of the estate of her husband. The appellants Gladys Szechenyi, Cathleen Vanderbilt Lowman and Gloria Laura Morgan Vanderbilt (all being issue of Cornelius and Ailce G. Vanderbilt, deceased), together with Gertrude Vanderbilt Whitney and the issue of Alfred G. Vanderbilt, were the appointees of the property passing by the exercise of such special or limited power of appointment. The appellants Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as executors of the will of the decedent, are the persons charged by the New York Tax Law with making the return for and paying the estate tax from the taxable estate of the decedent, as provided in the Tax Law.

Upon the petition and estate tax return filed by the appellant executors, and upon the report of the estate tax Appraiser, a *pro forma* order assessing estate tax upon the estate of the decedent was entered in the Surrogate's Court of the County of New York on July 13, 1936. This *pro forma* order included the entire value of the property of the estate of Cornelius Vanderbilt appointed by the decedent pursuant to such special or limited power of appointment as part of the taxable estate of the decedent on the

ground that such inclusion was required by subdivision 7-a of Section 249-r of Article 10-C, quoted above at pp. 2-3.

From this *pro forma* order the appellants duly took an appeal to Honorable James A. Foley, one of the Surrogates of the County of New York, pursuant to Section 249-x of said New York Tax Law. The proceedings on such appeal and in the said Surrogate's Court, the court of first instance of this cause, constituted the first judicial proceedings in the matter. Such proceedings were instituted by several notices of appeal filed by these appellants, in each of which it was expressly assigned as grounds of the appeal that the estate tax assessed was erroneous and illegal, for the reason that in so far as said Article 10-C purports to require the inclusion of the said appointed property in the gross estate of the decedent for the purpose of measuring the tax, said Article 10-C is unconstitutional in that it deprives the appellants of their property without due process of law and denies to them the equal protection of the laws, in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States (R. 121-138, fols. 361-413).

Upon hearing the case, Surrogate Foley, on June 7, 1937, filed an opinion and decision (163 Misc. 667), appended hereto as Exhibit B, in which, among other things, he held:

> "Finally there is no unconstitutionality in the inclusion by the Legislature of a statutory declaration that a fund subject to a *limited* power shall be deemed to be part of the grantee's property. I have pointed out that the question of the constitutionality of the legislative authority to levy that form of taxation was set at rest many years ago by the United States Supreme Court. (Chanler *v.* Kelsey, 205 U. S. 466, sustaining Matter of Delano, 176 N. Y. 486; Orr *v.* Gilman, 183 U. S. 278, sustaining Matter of Dows, 167 N. Y. 227; Matter of Zborowski, 213 N. Y. 109.)"

Pursuant to said opinion and decision an order of the Surrogate's Court of the County of New York was made and filed September 28, 1937. This order modified the aforesaid *pro forma* taxing order so as to exclude from the decedent's gross estate $650,000 appointed by the decedent to Gertrude Vanderbilt Whitney and to the issue of Alfred G. Vanderbilt, on the ground that the amount they received under the appointment was less than they would have received if the power had not been exercised. See *Matter of Duryea*, 277 N. Y. 310 (1938). However, the order of the Surrogate's Court affirmed the aforesaid *pro forma* taxing order in so far as it included in the gross estate of the decedent the appointed property involved in the appeal herein sought. This order

> "Ordered and Adjudged that the provisions of subdivision 7-a of Section 249-r of Article 10-C of the Tax Law, in so far as the provisions thereof are hereby held to be applicable to the trust fund created by the Seventh Article of the will of said Cornelius Vanderbilt, deceased, over which the decedent Alice G. Vanderbilt exercised by Article Third of her will the special or limited power of appointment granted to her by the Eighth Clause of said will of Cornelius Vanderbilt are valid and constitutional and do not violate Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States * * *; and that the inclusion of the value of said trust fund to the extent herein directed in the gross estate of said Alice G. Vanderbilt, deceased, for the purposes of assessing, fixing and determining the estate tax upon the estate of said Alice G. Vanderbilt, deceased, does not violate Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States * * *."

Thereafter, as provided by the laws of New York, these appellants duly took appeals from said order to the Appellate Division of the Supreme Court of the State of New

York in and for the First Judicial Department. Such appeals were instituted by the appellants' several notices of appeal from each and every part of said order (except so much thereof as had sustained the appeals and excluded the $650,000 mentioned above) (R. 2-8, fols. 5-23). The said Federal questions were thereby directly and necessarily presented to the Appellate Division for review. Upon hearing said appeals the Appellate Division, upon its unanimous decision rendered without opinion, entered an order on October 28, 1938, affirming the order of the Surrogate appealed from. (R. 104-105, fols. 310-315).

These appellants then duly took appeals from said order of the Appellate Division, to the Court of Appeals of the State of New York, under Section 588 of the New York Civil Practice Act. Such appeals were instituted by the appellants' joint notices of appeal from each and every part of the order of affirmance of the Appellate Division, and such appeals directly and necessarily presented to the Court of Appeals the Federal questions herein sought to be reviewed by the Supreme Court of the United States (R. 165-170, fols. 493-510). Upon hearing such appeals, the Court of Appeals on July 11, 1939, handed down an opinion sustaining the validity of the statute in question (281 N. Y. 297), a copy of which is appended hereto as Exhibit C.

In deciding the Federal constitutional questions against the contention of the appellants, the Court of Appeals declared in part:

> "The serious question in this case is whether the tax violates the Constitution of the United States."

The Court of Appeals decided that question in the negative. The questions whether the tax statute, as applied, violates the equal protection and due process clauses of the Fourteenth Amendment were raised in the Surrogate's Court, were saved by the various notices of appeal, were pre-

sented to each of the State courts by brief and oral argument, and were necessarily decided by them.

Pursuant to the decision of the Court of Appeals, the clerk of that court entered a final judgment and order of affirmance of the order of the Appellate Division on July 11, 1939 (R. 173-175). By this judgment and order of affirmance, the cause was duly remitted to the Surrogate's Court of New York County. The remittitur having been filed in the said Surrogate's Court, an order was made by said Surrogate's Court on August 21, 1939, and entered on August 22, 1939, making the order of affirmance of the Court of Appeals the final order of the said Surrogate's Court (R. 191-193).

(5) For a statement of the grounds upon which it is believed that the questions involved in the cause are substantial, the appellants respectfully show:

The decedent was the widow of Cornelius Vanderbilt, who died on September 12, 1899 (R. 81, fol. 243). By his will, Cornelius Vanderbilt created a trust for the payment of an annual income of $250,000 to the decedent, and gave the remainder of this trust fund to four named children and their issue (and to any child born after his death) in such proportions as his wife might appoint in her will, the trust fund to be divided equally in default of such appointment.

The power which the decedent thus received was, under the law of New York, a *special power in trust*, which the doctrine of equitable fraud forbade her to exercise for her own purposes. As the Court of Appeals has held, the decedent's power of appointment

> "was not general. By its exercise she could obtain no benefit for herself, her creditors or her estate. * * * When she exercised that power she gave her appointees nothing which belonged to her and she relinquished no

rights which she might have asserted for herself. Nevertheless, the transfer of that property has been taxed in her estate and not in the estate of Cornelius Vanderbilt. The tax so imposed is many times greater than it would have been if the transfer had been taxed in the estate of the donor of the power" (R. 179).

The Court of Appeals construed subdivision 7-a of Section 249-r as requiring the appointed property (except the $650,000 mentioned above) to be included in the gross estate of the decedent. The effect of including in the gross estate of the decedent the property appointed under the special power in trust was to increase the total estate taxes payable by approximately $852,000. Of this additional amount, about $165,000 was imposed in respect of the decedent's own property, the increase being due to the fact that the rates of the New York estate tax are progressive and the inclusion of the appointed property in the gross estate caused the estate to fall into a higher bracket. The tax imposed in respect of the appointed property was approximately $660,000 greater than if it had been taxed in the estate of Cornelius Vanderbilt, and approximately $155,000 greater than if it had been subjected to an estate tax at the present rates, but not aggregated with the decedent's own property.

The inclusion in the estate of the decedent, for the purpose of measuring a progressive estate tax, of property in which the decedent never had any beneficial interest but over which she exercised merely a special or limited and wholly non-beneficial power of appointment, raises questions, both under the due process and under the equal protection clause of the Fourteenth Amendment, which have never come before this Court.

The case also presents a question under the equal protection clause of the Fourteenth Amendment, arising out of the chronological classification which, by subdivision 7-a of Section 249-r, is attempted to be made between trans-

actions subject to the tax and those not subject to it. On this question there is recent authority in this Court which appellants believe establishes that such a classification violates the equal protection clause.

The appellants respectfully submit that the Federal constitutional questions, properly raised and necessarily decided by the State courts and now before this Court on appeal, are substantial Federal questions within the rule of *Zucht* v. *King*, 260 U. S. 174, 176, 177 (1922).

It cannot be contended that they are "so absolutely devoid of merit as to be frivolous." Compare *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311 (1902). The Court of Appeals itself, in the passage from its opinion quoted above, has expressly characterized the constitutional aspect of the case as a serious one.

Nor can it be urged that they have "been so explicitly foreclosed by a decision or decisions of this Court as to leave no room for real controversy." *Ibid.* The opinion of the Court of Appeals does not purport to be based upon any decision of the United States Supreme Court. On the contrary, the entire effort of the opinion is to distinguish various decisions of the Supreme Court in which provisions of tax statutes had been found to be in conflict with the Constitution. After reviewing such decisions, the Court of Appeals states:

> "The facts present in this case are so different from those presented in the cited cases that they furnish, at best, imperfect analogies."

(a) *Due Process Question.* The question whether the due process clause of the Fourteenth Amendment permits the inclusion in the estate of a decedent, for the purpose of measuring a progressive estate tax, of property in which the decedent never had any beneficial interest, but over which the decedent had merely a special or limited and

wholly non-beneficial power of testamentary appointment, is a substantial Federal question.

This Court has never had occasion to pass upon this issue directly. Although the Federal Estate Tax Law has for many years (ever since the Revenue Act of 1918) required the inclusion in the decedent's taxable estate of property passing under a general power of appointment exercised by the decedent, it has never contained a provision purporting to subject to the Federal estate tax property in respect of which the decedent had only a special or limited power of appointment.

The inclusion in the decedent's taxable estate of the property here in question involves an arbitrary and erroneous factual assumption that the decedent stood in a relation to this property which was substantially the equivalent of ownership. The appellants urge that, by sanctioning this arbitrary factual assumption of the Legislature, the decision of the Court of Appeals conflicts with the principle enunciated in *Hooper* v. *Tax Commission*, 284 U. S. 206, 215 (1931) and *Heiner* v. *Donnan*, 285 U. S. 312, 325 (1932). The prior decisions of this Court, far from foreclosing the question against the appellants, go a long way toward foreclosing it in their favor. It is therefore a substantial question deserving review.

(b) *First Equal Protection Question.* The question whether the equal protection clause permits the State to tax the decedent's estate more heavily than the estate of a decedent having the same amount of beneficially owned property but exercising no special or limited power of appointment, is a substantial Federal question.

In this connection, it should be observed that the Constitution imposes upon the States a more exacting requirement of fairness than is placed on the Federal Government. The Federal Government is subject only to the prohibition

against deprivation of property without due process of law, but the States are subject also to the equal protection clause. *La Belle Iron Works v. United States*, 256 U. S. 377, 392 (1921); *Barclay & Co. v. Edwards*, 267 U. S. 442, 450 (1924); *Heiner v. Donnan*, 285 U. S. 312, 338; 347-348 (1932) (Stone, J., dissenting). Therefore even if it should be held that inclusion of the appointive property in the estate on the basis of the capricious factual assumption that it "belonged" to the decedent does not violate the due process clause, it nevertheless seems plain that the *arbitrary classification* produced by the application of that factual assumption violates the equal protection clause.

The precise import of this equal protection question is the more readily perceived when it is recalled that, by the aggregation of appointive property with property beneficially owned by the decedent, the tax imposed *in respect of the latter* has been increased by some $165,000. If the decedent had not been granted or had not exercised the special or limited power of appointment, the tax imposed in respect of her own property would have been $165,000 less, even though she would have had no less property to give, and the recipients of her own property would have received no less than they actually did.

This Court has held that "A classification for purposes of taxation must rest on some reasonable distinction." *Schlesinger v. Wisconsin*, 270 U. S. 230, 240 (1926); *Louisville Gas Co. v. Coleman*, 277 U. S. 32 (1928); *Colgate v. Harvey*, 296 U. S. 404 (1935). The difference in treatment here complained of rests on no such reasonable distinction.

This question is not foreclosed by the prior decisions of this Court, and is a substantial question deserving review.

(c) *Second Equal Protection Question.* The question whether the equal protection clause of the Fourteenth

Amendment permits the State to tax the decedent's estate more heavily than the precisely similar estate of a decedent who exercises a special or limited power of appointment created after September 1, 1930, is a substantial Federal question.

Under the New York Tax Law, property passing under a special or limited power of appointment is included in the estate of the grantee of the power if, but only if, it was not subject to a death tax in the estate of the grantor of the power, and since upon the enactment of Article 10-C, effective September 1, 1930, all appointive property became subject to a death tax (the new estate tax) upon the death of the grantor of the power (such property being as much a part of the grantor's estate for the purpose of this tax as any of his other property), it is clear that the applicability of subdivision 7-a depends on whether the power of appointment involved was created before September 1, 1930, in which case subdivision 7-a may apply, or after September 1, 1930, in which case subdivision 7-a can never apply.*

This Court has squarely held that such a chronological classification in a death tax statute is arbitrary and capricious and constitutes a denial of the equal protection of the law. *Binney* v. *Long*, 299 U. S. 280 (1936).

We submit that this recent decision of the United States Supreme Court is alone a sufficient basis for reversal of the decision of the court below in the present case. It follows that the question is a substantial one and deserves review.

(6) The following cases support the jurisdiction of the Supreme Court in this cause: *Salomon* v. *State Tax Commis-*

* Between April 2, 1925, and September 1, 1930, the period when Article 10-B was operative, appointive property was subject to a death tax in the estate of a resident grantor of a power, not in all cases, but whenever his net estate was of a certain minimum value as prescribed in Article 10-B.

sion, 278 U. S. 484 (1929); *Funkhouser* v. *J. B. Preston Co., Inc.*, 290 U. S. 163 (1933); *Mayflower Farms, Inc.* v. *Ten Eyck*, 297 U. S. 266 (1936).

Respectfully submitted,

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GLORIA LAURA MORGAN VANDERBILT, *Infant, Appellant, Petitioner, by Thomas B. Gilchrist, as General Guardian of Her Property,*
By THOMAS B. GILCHRIST,
Her Counsel.

THOMAS B. GILCHRIST, *as General Guardian of the Property of Gloria Laura Morgan Vanderbilt, Infant, Appellant, Petitioner;*

THOMAS B. GILCHRIST,

His Counsel.

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EXHIBIT "A."

§ 249-r, *Gross estate.*

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated (except real property situated and tangible personal property having an actual situs outside this state):

1. To the extent of the interest therein of the decedent at the time of his death;

2. To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death, as dower, curtesy or by virtue of a statute creating an estate in lieu of dower or curtesy;

3. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (a) the possession or enjoyment of, or the right to the income from, the property or (b) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property made by the decedent within two years prior to his death, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this article;

4. To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the

enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death. For the purposes of this paragraph the power to alter, amend, or revoke shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of five thousand dollars, then, to the extent of such excess, such relinquishment or relinquishments shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this article;

5. To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited with any person carrying on the banking business, in their joint names and payable to either or the survivor except such part thereof as may be shown to have originally belonged to such other person and never to have been received or ac-

quired by the latter from the decedent for less than an adequate and full consideration in money or money's worth; provided, that where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person; provided, further, that where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decendent and spouse, then to the extent of one half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants, and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants;

6. To the extent of any personal property belonging to a husband which passes to his widow by virtue of her survivorship because of the husband having placed such property in his and his wife's names with intent to create a right of survivorship in her;

7. To the extent of any property passing under a general power of appointment exercised by the decedent (a) by will, or (b) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, or (c) by deed under which he has retained for his life of for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth;

7-a. To the extent of any property passing under a power of appointment exercised by the decedent (a) by will, or

(b) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth, exclusive of property the value of which is required to be included in the gross estate pursuant to paragraph numbered seven of this section, and provided that the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof.

8. To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life;

9. To the extent of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life, but only to the extent that such amount is required to be included in the gross estate under the provisions for the taxing of estates contained in any revenue act of the United States applicable to the estate of the decedent.

10. Subdivisions two, three, four, five, six, seven, eight and nine of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this article;

11. If any one of the transfers, trusts, interests, rights, or powers enumerated and described in subdivisions three, four and seven of this section is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

12. From the purposes of this article, a relinquishment or promised relinquishment of dower, curtesy or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration "in money or money's worth."

[NOTE.—The above text includes certain amendments not material to the present controversy.]

EXHIBIT "B."

Opinion and Decision of Surrogate Foley, Filed June 7, 1937.

(163 Misc. 667)

Estate of Alice G. Vanderbilt.

This is an appeal by the executors and by individual beneficiaries from the *pro forma* order of July 13th, 1936 fixing the estate tax upon the appraiser's report.

Cornelius Vanderbilt died on September 12th, 1899. Under his will, among other bequests, he gave to his wife, Alice G. Vanderbilt, the decedent here, a fixed annual income of $250,000. Provision was made for the setting aside of a trust fund of securities sufficient to pay that annual amount. He conferred upon her a limited power of appointment over the principal of the fund restricting her in her disposition to legacies to be given to their issue in such shares as she should direct in her last will. In default of the exercise by Mrs. Vanderbilt of this limited power, he provided that the fund be divided among their four children equally, with substitution in case of the death of any of them to their issue or to the surviyors where there was no issue of any deceased child.

Mrs. Vanderbilt died on April 22nd, 1934. Her will exercised the power of appointment by specific reference to the terms of her husband's will. She gave to her daughter, Gertrude V. Whitney $150,000, and to the issue of her deceased son, Alfred $500,000. Of the residue she gave one-third to the issue of her deceased son, Reginald, and the remaining two-thirds to her daughter, Gladys Szechenyi.

In his report in the pending estate, the tax appraiser has found the value of the fund at the date of the death of Mrs. Vanderbilt to have been $5,935,572.07. He has taken the full value of the fund without reference to any deduction for the value of the life estate of Mrs. Vanderbilt. He has added the full undiminished value to the personal estate left by her. The combined gross estate as found by him is $10,770,907.17. The net estate is fixed at $10,004,587.85. A tax has been assessed against the succession to this amount in the sum of $1,335,812.19. By the inclusion of the appointed fund the total tax has been increased by approximately $900,000, and the tax upon her personal estate has been increased by approximately $200,000.

The grounds of appeal are first that there was erroneously included as part of the decedent's gross estate the appraised value of the appointed fund, and second that there was erroneously included in the appraised value of the appointed fund, (a) the amount of the appointed legacy bequeathed by Mrs. Vanderbilt to her daughter, Mrs. Whitney, and (b) the amounts of the appointed legacies passing to the three children of her son Alfred. Upon the second ground of appeal these beneficiaries asserted a right to elect to take their shares under the donor's will and thereby to renounce the lesser benefits derived by them under the donee's will.

The second ground of appeal may be disposed of readily. It is sustained. The amounts payable to the designated legatees under the exercise of the appointment are less than they would have received had the power not been exercised. In default of the power they would have taken greatly increased shares under the will of Cornelius Vanderbilt. Under such circumstances the law is clear that they may elect to take under the will of the donor and not under the exercise of the power by the donee. (Matter of Ripley, 122 App. Div. 419, aff'd. 192 N. Y. 536; Matter of Slosson, 216 N. Y. 79; Matter of Taylor, 121 Misc. 7, aff'd. 209 App. Div. 299, aff'd 239 N. Y. 582.) By this disposition these legacies do not escape taxation for they become taxable in the estate of the donor in a proper proceeding. The amounts, however, of their respective shares must be eliminated from the gross estate of the decedent here and the tax recomputed. The *pro forma* order in this respect is therefore modified.

There remains for disposition the first ground of appeal. It is contended in the briefs of the appellants (1) that subdivision 7-a of Section 249-r of Article 10-C of the Tax Law, under which the appraiser included the appointed fund as part of this decedent's gross estate, did not permit such inclusion; (2) that if that section did authorize such inclusion it is violative of both Federal and State constitutions since the State has attempted to tax property without due process of law by imposing a tax upon the exercise by the donee of a limited power of appointment; (3) that property passing under a limited power is not the property of the donee of the power and that by reason of the substitution by the Legislature in 1930 of an estate tax (Article 10-C) in place of the former transfer tax (Article 10) such property may not be included in the gross estate of the donee of the power; and (4) that if the fund be held taxable there should be deducted therefrom the value of the life estate of this decedent. All these contentions and the entire ground of appeal are overruled.

It is unnecessary to discuss at length the principles applicable to the taxation of powers of appointment which have been so clearly fixed by the Court of Appeals. These well established rules dispose of many of the arguments of the appellants. Briefly stated these rules are as follows: (1) the property passing under the exercise of a power of appointment is taxable in the donee's estate; (2) regardless of any technical question as to the donee's title it is the donee's exercise of the power that renders it taxable in his estate; (3) it is the exercise of the power rather than the creation thereof which effected the transfer and therefore no transfer is taxable until the power is exercised, or it is found that default in exercising the power has actually occurred; (4) the exercise of the power is taxable in the donee's estate even though at the time of the creation of the power there was no law in force taxing such transfers; (5) the Court of Appeals has drawn no distinction between *general* and *limited* powers of appointment and the latter are taxable in the donee's estate, when exercised; and (6) it is only where the donee of the power fails to exercise it that the fund or property subject to the power is referred back to the donee's estate for taxation.

Under the Transfer Tax Law prior to 1897, property passing, pursuant to the exercise of a power of appointment, was taxable only in the estate of the donor. (Matter of Stewart, 131 N. Y. 274.) That policy was changed by Chapter 284 of the Laws of 1897, which provided for the taxation of such property in the estate of the donee. This modification was accomplished by the addition of subdivision 5 to Section 220 of the Tax Law (enacted April 16, 1897). It was in effect at the date of death of Cornelius Vanderbilt on September 12th, 1899. Subdivision 5 provided:

> "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will."

Thereafter the Legislature by Chapter 76 of the Laws of 1899 (in effect March 14, 1899) amended Section 230 of the Tax Law to provide:

> "When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon such transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith, out of the property transferred * * *."

The Court of Appeals held that the latter amendment in no way affected or repealed subdivision 5 of Section 220 set forth above. (Matter of Howe, 176 N. Y. 570.) At the date of death of Cornelius Vanderbilt, therefore, the Tax Law specifically provided for the imposition of the tax in the donee's estate in the event that the power was ex-

ercised. In the exaction of a tax under this section, the court did not differentiate between general and limited powers of appointment. The leading authorities have sustained the taxability of a limited power. (Matter of Vanderbilt, 50 App. Div. 246, aff'd. 163 N. Y. 597; Matter of Dows, 167 N. Y. 227, sustained *sub-nom* Orr *v.* Gilman, 183 U. S. 278; Matter of Howe, *supra;* Matter of Delano, 176 N. Y. 486; Matter of Wendel, 223 N. Y. 433.) The tax was imposed in the donee's estate even though at the time the power was created there was no law in force taxing such transfers. (Matter of Vanderbilt, 50 App. Div. 246, aff'd. 163 N. Y. 597; Matter of Dows, *supra.*) The same treatment was accorded powers created by deeds executed long before the existence of any transfer tax law. (Matter of Delano, *supra.*)

It will thus be seen that the contentions of the appellants in so far as they question the condition of the law existing at the date of death of Cornelius Vanderbilt in 1899 are without support in the authorities. A *limited* power of appointment was taxable in the donee's estate. Taxation was postponed until the death of the donee. The constitutional authority of the State to tax had been sustained by the United States Supreme Court in Chanler *v.* Kelsey, 205 U. S. 466 sustaining Matter of Delano, 176 N. Y. 486, Orr *v.* Gilman, 183 U. S. 278.

The addition of the appointed fund here to the individual property of Mrs. Vanderbilt was therefore proper.

Equally untenable is the contention of the appellants that the order which fixed the tax in the Estate of Cornelius Vanderbilt is *res judicata.* It is asserted in this connection that the failure to include a specific provision in the order in that estate suspending taxation until the death of the donee, was a complete and final adjudication that the appointive fund was forever exempt from taxation. It is also asserted that the Court of Appeals in its decision on the appeal from that order in some way held the transfer to be taxable only in the estate of the donor. Both of the claims find no support in the applicable law or in the actual adjudications in the tax proceeding in Mr. Vanderbilt's estate.

Upon the first contention it has been the law of this State for many years that the omission in the appraiser's report or in the order entered thereon, of a provision suspending taxation of the remainder of a fund is not an adjudication as to the exemption of the estate of the donee where the power was exercised or an adjudication as to the exemption of the estate from future taxation in default of the exercise of the power. (Matter of Naylor, 189 N. Y. 556, aff'g. 120 App. Div. 738; Matter of Duff, 114 Misc. 309, aff'd. 196 App. Div. 969; Matter of Goldenberg, 187 App. Div. 692; Matter of Bucki, 172 App. Div. 455; Matter of Seligmann, 170 App. Div. 837; Matter of Carey, 197 App. Div. 566, aff'g. 115 Misc. 732 on opinion below; Matter of Jesup, 155 Misc. 846.) It was the practice in the Surrogate's Courts throughout the State after the enactment in 1897 of Section 220, subdivision 5, to make a simple order taxing the actual transfers in the donor's estate. The existing law itself provided for taxation in the event of the exercise or non-exercise of the power. (Matter of Howe, *supra.*) The mention of postponement or suspension in the order was therefore unnecessary. In 1899 when Mr. Vanderbilt died there was no specific provision for suspension in the statute. That provision came into the law in 1911 (Chapter 800, Laws of 1911, in effect July 28, 1911) with respect to taxing contingent remainders and suspending the tax until the actual eventuality became fixed. These amendments and the cases which construe them, however, have no application to the present estate except as historical interest. (Matter of Zborowski, 213 N. Y. 109; Matter of De Cordova, 199 App. Div. 492, aff'd, 234 N. Y. 514.) In Matter of Duff, Matter of Naylor and Matter of Goldenberg cited above, there was no express provision for suspension in the original order but its absence in each of these cases was held not to preclude the fixation of the tax in subsequent years under statutory authority. It is stated in Matter of Goldenberg, *supra*, that the circumstance that the order is silent as to a transfer or estate does not bar the parties interested from asserting their right in a subsequent proceeding "for the only matters that are *res judicata* are those embodied in an order or judgment and not those omitted therefrom" (187 App. Div. 692, at page 696).

Here, taxation of the remainder was properly held in abeyance and the mere statement in the appraiser's report of the valuation of the remainder of the fund was sufficient to indicate that the right to tax was reserved by the State for future determination. The defense of *res judicata* is not available to the executors or legatees on this phase of the case.

Upon the alternative ground urged as *res judicata*, neither the record in Matter of Vanderbilt, 172 N. Y. 69, nor the determinations of the lower courts, nor the decision of the Court of Appeals sustain the executors' contentions that the final determination in that proceeding is conclusive in the present proceeding. The Court of Appeals did not hold that a tax should have been imposed in the donor's estate upon the appointive fund. There is no indication whatsoever in its opinion that the transfer was declared taxable in that estate. The appeal of the State Comptroller whereby he sought to tax the appointive fund presently in the donor's estate was abandoned before the case reached the Court of Appeals. The final determination of that Court did not affect the fund involved in this proceeding. It was the residuary trust fund that was considered, which, as stated by Chief Judge Cullen in his analysis of the *Vanderbilt* decision, in Matter of Burgess (204 N. Y. 265 at page 269) contained "no power of appointment". The decision only sustained the validity of Section 230 of the Tax Law and held that under its provisions the tax on the contingent residuary interests was immediately payable out of the estate to be computed at the highest rate at which under any contingency the property might be taxable.

Undoubtedly, if the Court of Appeals had been asked to rule upon the alleged contradiction between the terms of Section 230 and Section 220 of the Tax Law it would have held in Matter of Vanderbilt, as it subsequently held in Matter of Howe, 176 N. Y. 570, that the amendment of Section 230 did not repeal or nullify the provisions of Section 220. It would have held that property passing under a power of appointment should be taxed in the donee's estate as the section directed just as if the donee of the power was the owner of the property. It would have held

further just as it did in Matter of Howe, *supra*, that the remainders were not taxable until the death of the donee and the final ascertainment of exercise or non-exercise. Furthermore on the question of *res judicata* the order entered in the Surrogate's Court on the remittitur of the Court of Appeals and upon the stipulation of the parties contained no reference to the taxability of the appointive fund or its exemption. At the time of the preparation and entry of that order there must have been a complete and proper understanding by the attorneys, both for the State and the estate, of the reservation of the right of the State to tax in a subsequent proceeding.

The remaining contention of the appellants involves the interpretation of subdivision 7-a of Section 249-r of the Tax Law and its applicability to the estate of the donee. That section provides in general as to the manner of the valuation of the gross estate and in particular for the inclusion within it of certain special types of property. The opening sentence of the Section reads:

> "*Gross Estate.* The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *."

Then follow the enumeration and description of the special kinds of property. Subdivision 7-a of the Section reads:

> "To the extent of any property passing under a power of appointment exercised by the decedent (a) by will, * * * exclusive of property the value of which is required to be included in the gross estate pursuant to paragraph numbered seven of this section, and provided that the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof."

The history of this enactment throws light upon its meaning. When the Decedent Estate Commission, in cooperation with

the State Tax Commission, drafted the new Estate Tax Law, the context and policies followed in great part those of the Federal Estate Tax Statutes. The recommendation of the two Commissions was adopted by the Legislature and became Article 10-C of the Tax Law. It became effective on September 1st, 1930. Prior to that date Section 220 of the Tax Law authorized the imposition of a tax in the donee's estate upon the exercise of a power of appointment whether general or limited. The new Estate Tax Law, beginning at the date mentioned above, imposed a tax in the donee's estate only upon the exercise of a *general* power of appointment. Such was the Federal policy. Limited powers were exempted from taxation by the omission of any express statutory authority to tax them.

In respect of the policy of New York State to tax limited powers in the estate of the donee it was apparent that the terms of the new statute of 1930 substantially changed the previous rule and permitted such powers to escape taxation in the donee's estate. Thereupon the State Tax Commission drew the provisions of subdivision 7-a to supplement subdivision 7 which taxed only general powers. The new subdivision 7-a became effective on March 21, 1932. Mrs. Vanderbilt died on April 22, 1934. If her death had occurred between September 1, 1930 and March 21, 1932 the fund here would have been free from taxation. Its succession could not have been taxed in the donor's estate, because the statutory provisions in existence at the date of Cornelius Vanderbilt's death made it taxable, if the power was exercised, only in the estate of the donee. (Section 220.) It could not have been taxed as part of the estate of Mrs. Vanderbilt because it was a limited or special power and its succession was exempt. An explanatory memorandum of the State Tax Commission prepared at the time of the drafting and introduction of the legislative bill has been submitted to the Surrogate by consent of the parties. It is illuminative of the reasons which led to the enactment of new subdivision 7-a. The State Tax Commission pointed out that the existing law in 1932, prior to the enactment of the subdivision, permitted the fund to escape taxation in both the estate of the grantor and the estate of the grantee of the power. It was stated in reference to the measure:

"This bill provides that property transferred by the exercise of a special or limited power of appointment shall be included in the decedent's gross estate for the purpose of the present estate tax in the event that it is not taxable or has not been taxed in the estate of the grantor of the power and thus insures that one death tax will be imposed upon such property."

Entirely aside from this memorandum, as I construe the legislative intent in the enactment of the subdivision, it provided for the inclusion in the gross estate of the donee of property passing under a special or limited power of appointment under the exact terms of the power exercised by Mrs. Vanderbilt and given to her under the will of her husband. The subdivision may be paraphrased as follows: (1) if the original grantor's estate was subject to a tax and impliedly that tax had been paid, no further tax would be imposed under the terms of the subdivision in the donee's estate; (2) if the estate of the grantor would have been taxable except for a statute, which provided that the tax on the transfer of the property should be imposed in the estate of the grantee, taxation of the fund under the subdivision must be enforced in the grantee's estate when the power is exercised.

This latter statement covers the exact situation in Cornelius Vanderbilt's estate. If Section 220 had not been in existence the tax would have been imposed under Section 230 upon the appointed fund in his estate. The application of Section 220 provided the alternative mentioned in subdivision 7-a for the assessment of the tax in the grantee's estate and exempted the estate of Mr. Vanderbilt from taxation in the event of the exercise of the power. It should be noted in this aspect of the case that counsel for the appellants in their briefs have overlooked those decisions which have held that in default of the exercise of the power, a tax could have been imposed validly in the estate of the grantor. (Matter of Naylor, 189 N. Y. 556; Matter of Duff, 114 Misc. 309, aff'd. 196 App. Div. 969 on the opinion of the Surrogate; Matter of Goldenberg, 187 App. Div. 692.)

Moreover Matter of Burgess, 204 N. Y. 265, cited by them instead of supporting their claims sustains the opposite con-

clusion reached by the Surrogate. That case only applied to a power that was contingent, because the right to appoint given by the terms of the will was subject to such conditions that it might never come into existence. In that case the present taxability in the donor's estate was therefore sustained. There were certain trusts, however, in the estate where the powers were vested and not contingent. The Court held that the funds affected by such powers were not presently taxable. Taxation was postponed until exercise and was necessarily required to be assessed in that event in the donee's estate.

The power given by Mr. Vanderbilt to his wife was a *vested* power and not a *contingent* power. It was subject to no conditions or contingencies except the choice of his wife to exercise it or not. The latter privilege did not affect the inherent nature of the power as absolutely vested in her. Matter of Burgess, *supra*, is therefore authority for the conclusion reached by the Surrogate.

Finally there is no unconstitutionality in the inclusion by the Legislature of a statutory declaration that a fund subject to a *limited* power shall be deemed to be part of the grantee's property. I have pointed out that the question of the constitutionality of the legislative authority to levy that form of taxation was set at rest many years ago by the United States Supreme Court. (Chanler *v.* Kelsey, 205 U. S. 466, sustaining Matter of Delano, 176 N. Y. 486; Orr *v.* Gilman, 183 U. S. 278, sustaining Matter of Dows, 167 N. Y. 227; Matter of Zborowski, 213 N. Y. 109.)

It is the exercise of the power which is the basis of the authority to tax. The Legislature for taxing purpose has created artificial estates which include items clearly not owned in title or in fee by the decedent. Thus it has included by definition insurance on the decedent's life payable to a designated beneficiary and accruing only at the death of the insured. Irrevocable trusts, in which the decedent has only retained a life interest are included in the gross estate. Similarly, interests in *inter vivos* trust funds where the enjoyment is subject to change by the exercise by the decedent of a power to alter, amend or revoke are included. The privilege to transmit the appointed fund by will is one conferred by the State. By taxing the privilege the Legislature

in its exactments violates neither the Federal or State Constitution.

It is within the authority of the Legislature not only to declare the appointive property to be a part of the estate of the grantee, but also to make the passing of such property subject to the rates of tax in force at the date of death of the grantee; to provide for the exemptions to certain relations and charities at that time and not at the time of the death of the grantor; to fix the rates of tax based upon the relationship of the beneficiaries to the donee and not to the donor; to combine the individual property of the donee with the appointed property in order to compute the rate of tax; to tax the property in its character, realty or personalty, as it exists at the date of death of the donee and to fix its value as of that date rather than at the date of death of the grantor. (Matter of Dows, 167 N. Y. 227; Matter of Sandford, 250 App. Div. 310, N. Y. L. J. March 13, 1937; Matter of Rogers, 71 App. Div. 461, aff'd on opinion below 172 N. Y. 617; Matter of Walworth, 66 App. Div. 171; Matter of Seaver, 63 App. Div. 283; Matter of Duryea, 250 App. Div. 305, N. Y. L. J. March 13, 1937; Matter of Bucki, 172 App. Div. 455.)

For similar reasons, the statutes in existence at the date of death of the donee determine the amount of the appointive fund and whether it is to be taxed undiminished or diminished by the value of the life estate of the life tenant. The contention of the appellants that the value of the securities within the fund at the date of the death of Mrs. Vanderbilt—$5,935,572.07—must be reduced by the deduction of the value of her life estate is overruled. The statute in effect in 1934 at the date of her death made no provision for such deduction. The whole fund as it exists at the date of death of the donee must be included in the gross estate. Similar contentions as to parallel prior statutes have been overruled by the courts. (Matter of Bucki, 172 App. Div. 455; Matter of Seligmann, 170 App. Div. 837.) Since the law in effect at the date of the death of the donee applies, it is likewise immaterial whether the form of tax effective as of that date is a transfer tax or an estate tax. (Matter of Wendel, 223 N. Y. 433; Matter of Keeney, 194 N. Y. 281; Keeney *v.* N. Y., 222 U. S. 525.)

The difference between the two forms of tax is inconsequential. Simplicity in the method of assessment was effected by the enactment of the Estate Tax Law in 1930. The ultimate charge of the tax against the respective shares is practically the same under both systems of taxation. When the Estate Tax Law was adopted by the Legislature there was also enacted as part of the general program, new Section 124 of the Decedent Estate Law which provides, (in the absence of a contrary direction in the will) for the equitable apportionment and charging of the tax out of the benefits received by the respective legatees. The tax is imposed under either method upon the privilege to transmit the property by the will of the donee. The privilege may be given or withheld by the State.

The value of the diminished remainder set forth in the appraiser's report in the estate of Cornelius Vanderbilt and the order entered upon it is not conclusive here. The Surrogate was without jurisdiction to fix the value of such remainder in that proceeding. The Surrogate and the appraiser were limited to the valuation of the life estate. (Matter of Naylor, 189 N. Y. 556, aff'g. 120 App. Div. 738; Matter of Bucki, 172 App. Div. 455, 457; Matter of Seligmann, 170 App. Div. 837.)

Submit order on notice overruling the first ground of appeal and sustaining the second ground of appeal and modifying the order fixing the tax in accordance with the provisions of this decision.

J. A. E.

EXHIBIT "C."

In the Matter of the Appraisal under the Estate Tax Law of the Estate of ALICE G. VANDERBILT, Deceased.

GERTRUDE VANDERBILT WHITNEY et al., as Executors of ALICE G. VANDERBILT, Deceased, et al., Appellants; STATE TAX COMMISSION and GERTRUDE VANDERBILT WHITNEY, Individually, Respondents.

(Decided July 11, 1939.)

APPEAL from an order of the Appellate Division, first department, affirming an order of the Surrogate determin-

ing the value of the estate of the decedent for the purpose of the estate tax imposed by article 10-C of the Tax Law.

Arthur A. Ballantine, Roy C. Gasser, Thomas B. Gilchrist, Horace R. Lamb and *Leo Gottlieb* for Gertrude V. Whitney et al., as executors, et al., appellants.

Thomas B. Gilchrist and *Hampton D. Ewing, Jr.*, for Thomas B. Gilchrist, as general guardian of the property of Gloria L. M. Vanderbilt, an infant, appellant.

Mortimer M. Kassell and *Harry T. O'Brien, Jr.*, for State Tax Commission, respondent.

LEHMAN, J. Alice G. Vanderbilt died on April 22, 1934. Her "gross estate" was appraised at $10,120,907.17. Deductions of $766,319.32, allowed by statute, left a "net estate" of $9,354,587.85. A transfer tax measured by that "net estate" has been assessed. The decedent was the widow of Cornelius Vanderbilt, who died in September, 1899. By his will Cornelius Vanderbilt created a fund to provide an income of $250,000 to his wife during her lifetime. He directed that at the death of his wife "the principal set apart * * * to create the annual payment of two hundred and fifty thousand dollars to my wife, shall be given to our children, Gertrude, Alfred G., Reginald C. and Gladys Moore; and if any then be dead, to their issue, in such proportions and amounts as my said wife may direct or appoint in her last Will and Testament, and in default of such appointment the same shall be divided among our said four children equally, share and share alike, the issue of any such child or children to take its parent's share, *per stirpes* and not *per capita*." The decedent Mrs. Vanderbilt exercised the power of appointment conferred upon her. At her death the fund which was subject to that power was appraised at $5,935,572.07, and the full amount was included in the decedent's taxable estate by the tax appraiser. This, the appellants contend, was error.

By the exercise of her power of appointment the decedent gave to one daughter and the issue of a deceased son far more than they would otherwise have received under the will of Cornelius Vanderbilt, thus correspondingly reducing the amount which the other daughter and the issue of the other son would have received if she had failed

to exercise her power. The legatees, who received less through the exercise of the power than they would otherwise have received, have asserted a right to elect to take under the will of the creator of the power. The Surrogate has sustained their right to such election and the State does not challenge that ruling. Their legacies, then, are taxable, if at all, as part of the estate of Cornelius Vanderbilt, the donor of the power, and the amounts which they have received have been eliminated from the gross estate of Mrs. Vanderbilt, the donee of the power. (Cf. *Matter of Duryea*, 277 N. Y. 310.) Upon this appeal the question is whether the shares of the trust fund passing to the other daughter and grandchildren in accordance with the exercise of the power of appointment by the donee of the power were properly included in the gross estate of Mrs. Vanderbilt subject to tax as part of her estate. The shares so included constitute the major portion of the trust fund and more than half of the estate of Mrs. Vanderbilt, the donee of the power.

The property which was included in Mrs. Vanderbilt's estate did not at any time belong to her. It did not at her death pass *from* her to those whom she appointed to take. Her power of appointment was not general. By its exercise she could obtain no benefit for herself, her creditors or her estate. During her life the fund was held by trustees under the terms of the will of Cornelius Vanderbilt. She enjoyed under his will a life interest in the fund, and a tax measured by the value of that life interest was paid upon the death of Cornelius Vanderbilt. The remainder, which would vest in others upon her death, was not included in the tax assessed upon the transfer of his property. Mrs. Vanderbilt might, by exercise of her power of appointment, determine the shares which members of a limited group defined by the will of Cornelius Vanderbilt should receive out of property in the estate of Cornelius Vanderbilt and held by trustees under his will. When she exercised that power she gave her appointees nothing which belonged to her and she relinquished no rights which she might have asserted for herself. Nevertheless, the transfer of that property has been taxed in her estate and not in the estate of Cornelius Vanderbilt. The tax so imposed is many

times greater than it would have been if the transfer had been taxed in the estate of the donor of the power. The appellants maintain that the Tax Law (Cons. Laws, ch. 60), property construed, does not authorize the inclusion in the taxable estate of Mrs. Vanderbilt of property which was in no real sense a part of her estate, and that the Legislature could not authorize its inclusion without violation of restrictions placed by the Constitution of the United States upon the legislative power. The questions raised require a detailed statement and analysis of the history of the statutes of the State imposing death duties and of the proceedings had in fixing the tax upon the estate of Cornelius Vanderbilt in accordance with the statute in effect at his death.

The Tax Law then in effect (Laws of 1896, ch. 908), as amd. by Laws of 1897, ch. 284) provided that "a tax shall be and is hereby imposed upon the transfer of any property * * * in the following case:

"1. When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state. * * *

"5. Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure." (§ 220, subds. 1 and 5.)

We are concerned primarily with those provisions of the statute which might apply to taxation of transfers of property effected through the exercise of a power of appointment by the donee of the power. We are not concerned with those provisions of the statute which might apply where there has been a failure to exercise such a power.

Thus when the tax was assessed on the estate of Cornelius Vanderbilt though the life estate passing under the testator's will to his wife was at that time subject to a tax as part of his estate, the transfer of the fund at the death of his wife, either by her exercise of the power of appointment conferred upon her or, upon her failure to exercise that power, in accordance with the terms of the will of the donor of the power was declared by the statute to be taxable only at the date of the death of the donee of the power "in the same manner as though the property * * * belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will." The statute, it is clear, is not intended to draw any distinction between general powers of appointment and special or non-beneficial powers. It applies to every form of power. It was so construed and applied in assessing the tax upon the transfer of the estate of Cornelius Vanderbilt, and we are not referred to any case in which any other construction was urged "where there is an absolute gift of a power of appointment." (Cf. *Matter of Burgess*, 204 N. Y. 265, 270.) Such an absolute gift of a power of appointment was made here. Even though choice by the donee of the power was limited to a small group of persons and there may have been a theoretical possibility that none of that group would be in existence at the time fixed for the exercise of that power, yet under all possible circumstances the property was "certain to pass under the exercise or non-exercise of the power of appointment," and, therefore, the transfer was taxable in the estate of the donee. That would not be true where the gift of the power is to take effect only in contingencies which might never arise. In that respect this case differs from *Matter of Burgess* (*supra*), where the testator himself chose the persons to whom remainders should pass in certain contingencies, and conferred a power of appointment upon his trustees only if those contingencies did not arise.

The property affected by the power contingently given was in that case included in the taxable estate of the donor of the power, for otherwise, if the contingency upon which the gift of the power was to become effective should not arise, the transfer would not, under the statute, have been subject to any tax.

It should perhaps be added that until 1930 there was little, if any, reason based on any practical consideration why there should be differentiation between general powers of appointment and limited or non-beneficial powers. All transfers of the property of residents of the State by will or by the intestate laws were to be taxed. Transfers effected directly by the will of the resident owner were, of course, to be taxed in the estate of the testator; transfers effected by exercise of a power appointment conferred by such will were to be taxed as if the property had belonged to the donee of the power. The rate of taxation was not then measured by the size of the decedent's estate and would not be affected by the provision of the statute that a transfer of that property by the exercise of a power of appointment should be taxed as part of the estate of the donee of the power rather than of the donor. That provision was, then, hardly more than a new and convenient rule of administration. Under earlier statutes, taxing transfers by decedents, this court had held that "where the donee of the power has the right of selection, the interest appointed vests in the appointee at the time of the appointment, but his title relates to and is acquired under the instrument creating the power," and is taxable as part of the estate of the donor. (*Matter of Stewart*, 131 N. Y. 274, 281.) Even then it was necessary to postpone assessment and collection of the tax until the death of the donee, for under the earlier statutes it was held, too, that contingent remainders, or remainders which, though technically vested, were defeasible, could not be taxed until they vested indefeasibly. (*Matter of Curtis*, 142 N. Y. 219; *Matter of Burgess, supra.*) By taxing transfers of property effected through exercise of a power of appointment as if the property had belonged to the donee of the power rather than to the donor, the tax procedure was simplified, and at times the administration of the estate of

the donor could be closed earlier than would otherwise have been possible.

The Tax Law was further amended by chapter 76 of the Laws of 1899 so as to provide: "When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article." (§230.) In accordance with these provisions, which went into effect a short time before the death of Cornelius Vanderbilt, contingent estates or interests created by his will were taxed tentatively at the highest possible rate. (*Matter of Vanderbilt*, 172 N. Y. 69.) Such contingent estates then taxable did not, however, include any estate or interest in the trust fund to which Mrs. Vanderbilt's power of appointment related, for in construing the statute this court had held that "it is the exercise of the power * * *, which effects the transfer which the statute makes taxable," and that section had no application in such case. (*Matter of Howe*, 86 App. Div. 286, 288; aff'd on opinion below, 176 N. Y. 570.)

The State regulates succession to a decedent's property. It permits an owner to provide by will to whom his property shall be transferred upon his death. He may appoint the person to whom the property shall go or he may give to another a power of appointment to be exercised at some future time. If the donee of the power is given a life interest in the property and a general power of appointment which he may exercise for his own benefit, his rights of enjoyment and control are closely analogous to the rights of an owner. Even then, however, it remains theoretically true that the property does not become his and by exercise of the power of appointment he transfers to the appointee a title which relates back to the instrument creating the power.

The statutory rule ignores all such theoretical considerations when it requires that a transfer effected through exercise of the power of appointment shall be taxed "in

the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will." The statutory rule was, nevertheless, based soundly upon practical considerations which the Legislature decided should control. "Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it." (*Matter of Dows*, 167 N. Y. 227, 231; affd. *sub nom., Orr* v. *Gilman*, 183 U. S. 278.) For that reason this court held that a tax may be imposed upon a transfer effected through exercise of the power, and that is true though "there was no statute imposing a succession tax of any kind in force when the original disposition of the property was made and the power was created. That transfer is not taxed, and the statute makes no effort to reach it. It is the practical transfer through the exercise of the power by will that is taxed and nothing else." (*Matter of Delano*, 176 N. Y. 486, 494.) In affirming that decision the Supreme Court of the United States pointed out that: "It may be that the donee had no interest in the estate as owner, but it took her act of appointment to finally transfer the estate to some of the class and take it from others. Notwithstanding the common-law rule that estates created by the execution of a power take effect as if created by the original deed, for some purposes the execution of the power is considered the source of title." (*Chanler* v. *Kelsey*, 205 U. S. 466, 474.) The statutory rule treating the execution of the power as the real source of title is, therefore, not arbitrary; at least, so long as the tax is not measured by the size of the estate of the person who makes the transfer. Mere postponement of the assessment of the tax is not a ground for complaint to the court. That is true even though the rate of taxation might be changed in the interval between the death of the donor of the power and the death of the donee or even though in the interval the tax laws were so amended that transfers previously not taxable were subjected to a tax. (*Matter of Dows, supra.*) Indeed, the appellants do not claim invalidity of the statutory rule on

such ground; they claim it is invalid as applied in this case on grounds which we shall hereafter consider.

We point out here, again, that we are concerned only with a transfer effected by the exercise of a power of appointment, not with any transfer upon failure to exercise such power. A statutory rule that whenever the donee of a power shall omit or fail to exercise it, a transfer shall be deemed to take place as though the persons becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power taking effect at the time of such omission or failure, is without any foundation either in fact or in theory. In such case the donee of the power transfers nothing to the person who succeeds to the property of the donor of the power in accordance with the will of the donor or the intestacy laws in effect at his death. Therefore, this court held that the part of the statute was invalid which purported to tax in that manner succession to property through failure to exercise a power. (*Matter of Lansing*, 182 N. Y. 238.) That decision did not affect the provisions of the Tax Law for the taxation of transfers through exercise of the power. To conform to that decision the Legislature then amended section 220 of the Tax Law by omitting the provision for the taxation of transfers upon failure to exercise a power of appointment but left intact the provision for taxation of transfers effected through exercise of a power. (Laws 1911, ch. 732.) That provision is still part of the Tax Law (§220, subd. 4), though no longer applicable to persons dying on or after September 1, 1930.

It thus appears plain that the transfer of the fund, created by the will of Cornelius Vanderbilt, to provide an income for his wife during her lifetime, which took effect at her death, was not subject to a death tax in the estate of Cornelius Vanderbilt, because at the time of his death the statute provided that the tax on such a transfer, effected by exercise of a power of appointment, should be imposed in the estate of the donee of the power. It would have been imposed in the estate of Mrs. Vanderbilt, the donee of the power, if she had died before September, 1930, and no effective challenge could have been made to a tax so imposed.

Prior to her death, however, the Legislature, by chapter 710 of the Laws of 1930, added article 10-C to the Tax Law, which substituted, in respect to persons dying after it took effect, an estate tax similar to the Federal estate tax (in place of the tax imposed by the earlier statute which we have described as an inheritance tax; *Matter of Cregan*, 275 N. Y. 337.) That involves, it has been said, a "distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death." (*Knowlton* v. *Moore*, 178 U. S. 41, at p. 77.) The older inheritance tax might be described as a tax on the privilege of receiving property on the death of another, and the new estate tax as a tax on the privilege of transmitting property upon death. (*Coolidge* v. *Long*, 282 U. S. 582.) These differences are not merely theoretical. They may carry practical consequences. The rate of the older inheritance tax was measured by the size of the interest received by the individual; the rate of the estate tax is measured by the size of the estate left by the decedent passing to few or many in accordance with the decedent's will or the intestacy laws. An *inheritance* tax, measured by the size of the interest *received* by an individual through the exercise of a power of appointment, though imposed in the estate of the donee of the power as if the transfer had been made by the donee of the property owned by him, produces no arbitrary inequality even where the power of appointment is a non-beneficial power and refers to property never owned by the donee. An estate tax measured by the size of the estate *transmitted* to others upon the owner's death might, however, produce unjust inequality if the law arbitrarily includes for such purpose any property which is in no real sense a part of the estate in which it is taxed. Accordingly, though the earlier "inheritance tax" statutes made no distinction between transfers effected through exercise of a general power of appointment and transfers effected through exercise of a limited or non-beneficial power, the statute of 1930 modelled upon the Federal estate tax laws incorporated a distinction previously drawn in the Federal statutes between transfers made through the exercise of "general" powers of appointment and transfers

through the exercise of limited powers. It provided that the value of the gross estate of a decedent subject to the tax shall include the value of "any property passing under a *general* power of appointment exercised by the decedent." (§249-r, subd. 7.) The value of property passing under a *limited* power of appointment would thereafter be included in the value of the estate, subject to tax, of the donor of the power.

That left a gap in the Tax Law, through which a transfer effected thereafter by exercise of a limited power of appointment created by will of a testator dying before the statute took effect would escape all taxation. To fill in that gap the Legislature, by chapter 320 of the Laws of 1932, added subdivision 7-a to section 249-r to provide that the value of the gross estate of a person dying thereafter should include the value of all property "passing under a power of appointment exercised by the decedent (a) by will, or (b) by deed * * * intended to take effect in possession or enjoyment at or after, his death, * * * provided that the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof."

It is plain that the purpose of the new subdivision was to restore the old rule that a transfer of property under a limited power of appointment exercised by a decedent should be taxed in the estate of the grantee of the power, in the small class of cases where otherwise the transfer would escape taxation. In those cases, the rule formulated in respect to an inheritance tax is to be applied now to an estate tax where the rate is measured by the size of the estate of the grantee of the power; and we are told that where, as in this case, the grantee did not own the property and the power of appointment could not be exercised by the grantee for his own benefit, such a tax produces a result so arbitrary and unjust that it would violate the provisions of the Fourteenth Amendment of the Constitution. At least, it is said, the validity of such a tax would be so doubtful

that the statute should be construed in manner which would avoid the doubt.

We are urged for that reason to limit the words "property passing under a power of appointment" to property in which the decedent had or could acquire a beneficial interest, and for analogy and precedent we are referred to a series of cases in the Federal Court exemplified by *Helvering* v. *Parker* (84 Fed. Rep. [2d] 838), where the courts have held that the Federal Estate Tax Law (§ 302-g; U. S. Code, tit. 26, § 411, subd. [g]), requiring the inclusion, in a decedent's taxable estate, of the proceeds of life insurance policies "taken out by the decedent upon his own life" did not apply where the insured reserved no right to surrender and cancel the policies, to pledge them for loans or to dispose of their proceeds for his own benefit during his life and no other beneficial right incidental to ownership or control. (Cf., also *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *Helvering* v. *Helmholtz*, 296 U. S. 93; *White* v. *Poor*, 296 U. S. 98.)

"A statute must be construed, *if fairly possible*, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." (*United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401; cf. *Knowlton* v. *Moore*, *supra*, at p. 77.) Tax statutes "*in case of doubt* * * * are construed most strongly against the Government, and in favor of the citizen." (*Gould* v. *Gould*, 245 U. S. 151, 153.) (Italics in both cases are ours.) Here, however, the purpose of the statute is clearly expressed and the construction urged upon us is not "*fairly possible*." The original statute made no distinction between beneficial or general power and limited or non-beneficial powers. The new statute does make the distinction between "general" powers and other powers, but it is clear that a transfer under any power of appointment, not general, which was taxable under the old statute in the estate of the donee of the power is intended to be so taxable also under subdivision 7-a of section 249-r. We cannot give to the statute a more limited application. If the subdivision does not apply in this case the passing of title to this property will escape taxation. That was not the legislative intent.

The serious question in this case is whether the tax violates the Constitution of the United States. The State has a broad power of taxation, but in the exercise of that power it may not provide a measure for a tax which is entirely arbitrary and which produces inequality and injustice so great as to deprive a taxpayer of the equal protection of the law. So it has been held that "a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment." (*Heiner* v. *Donnan*, 285 U. S. 312, 325.) Taxation, it has often been pointed out, is an intensely practical matter. The Legislature may not arbitrarily fix the measure of a tax by a fiction. (*Hooper* v. *Tax Commission*, 284 U. S. 206.) Always there must be some reason based on fact, not fiction, for imposing a particular tax upon a particular class, and absence of any basis for the classification may not be hidden by an arbitrary creation of a conclusive presumption. (*Schlesinger* v. *Wisconsin*, 270 U. S. 230.) The Supreme Court has authoritatively stated the rule which in such cases creates invalidity: "a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment." A statutory rule is beyond the power of the Legislature if the result would be "that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in fact by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description." (*Heiner* v. *Donnan*, *supra*, p. 327; cf. *Nichols* v. *Coolidge*, 274 U. S. 531; *Free* v. *Bowers*, 12 Fed. Rep. [2d] 625.)

The standard of what is arbitrary and unreasonable is not rigid. As we have often pointed out, the question is usually one of degree. A difference in the facts, seemingly slight; an emphasis on one factor rather than another, may produce varying results. Even in the cases cited there was division of opinion in the court, though the difference of opinion concerned only the application of the general rule. The rules are too well established to be challenged. The

facts present in this case are so different from those presented in the cited cases that they furnish at best imperfect analogies.

In considering the validity of the tax three factors must constantly be kept in mind: the nature of the tax, the measure of the tax and its incidence. Perhaps repetition is unnecessary, but we again point out that the statute in effect at the death of Cornelius Vanderbilt imposed no tax upon an inchoate transfer of a decedent's property to be effected thereafter by exercise of a power of appointment. Under that statute and under the present statute "it is the practical transfer through the exercise of the power by will that is taxed and nothing else." (*Matter of Delano, supra*, p. 494.) In 1932, when the Legislature enacted subdivision 7-a of section 249-r, the "practical transfer" had not been made. The Legislature was free at that time to impose a tax upon such transfer by a decedent dying thereafter, even if the earlier tax statute had imposed no such tax. (*Chanler v. Kelsey, supra.*) The Legislature chose to lay an "estate" tax measured by the aggregate of the property which was in a *practical* sense transferred by the will of the grantee of the power. Though the tax is paid out of the estate of the decedent, the Decedent Estate Law (Cons. Laws, ch. 13) provides that the tax so paid "shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues." (§ 124.) We may, therefore, properly assume that Mrs. Vanderbilt's appointees will ultimately bear the main burden of the tax in proportion to the property received.

Since an estate tax is an excise laid in respect to the privilege of transmitting property rights at death (*Coolidge v. Long, supra*), it can hardly be said that the statutory rule that the rate of the tax should be measured by the aggregate of the property so transmitted is entirely without basis in fact, even though the decedent did not own some of the property but merely had a limited power of appointment. In the cases cited by the appellants property was included in the aggregate which measured the tax, though it was not transmitted to others at the death by the decedent. In those cases death did not result "in a shifting, or in the comple-

tion of a shifting * * * of any economic benefit of property, which is the subject of a death tax." (*Heiner* v. *Donnan, supra*, p. 323.) Thereby arbitrary choice to include in the "estate" of the decedent property which did not pass at the decedent's death to which the estate was in no way related and from which the estate derived no benefit, the Legislature increased the rate of taxation upon the transfer of property which the decedent owned and transmitted. In the case we are now considering, no property is included in the aggregate which measured the tax which does not pass at Mrs. Vanderbilt's death to persons who take the property only because she so provided in her will. True, the inclusion of that property in Mrs. Vanderbilt's estate increases the rate of the tax which must be paid ultimately by those to whom the property *owned* by Mrs. Vanderbilt was transferred, as well as the tax which must be paid ultimately by those who receive property over which she had a limited power of appointment. Argument may be made that such a tax is not fair; indeed, the fact that under the Federal statute only a transfer of property under a general power of appointment is taxed in the estate of the grantee of the power indicates that Congress believed that it is fairer, as a general rule, that transfer under limited powers should be taxed in the estate of the grantor of the power. Such "unfairness" does not, however, render the statute invalid.

The ultimate burden of an estate tax rests upon the persons to whom the estate is transferred. Since the tax is measured by the total transferred to one or many, each pays a tax measured, not by the benefit he receives, but in some degree by the benefit others receive. Argument might be made that all estate taxes are to that extent unfair, but estate taxes are not open to challenge on such ground. The question is always whether the classification is reasonable; incidental hardship resulting from a reasonable classification is no ground of attack. If an estate tax upon the transfer through the exercise of the power of appointment by Mrs. Vanderbilt were imposed *now* in the estate of Cornelius Vanderbilt in accordance with provisions of article 10-C, perhaps the tax would be as large as if imposed in the estate of Mrs. Vanderbilt. The great disparity in the amount of

the tax imposed in the estate of Mrs. Vanderbilt and the amount of the tax if imposed in the estate of Cornelius Vanderbilt is due to the fact that a tax in the estate of Cornelius Vanderbilt would be measured in accordance with the statute in effect at his death, though, as we have pointed out, the tax is upon the transfer effected by Mrs. Vanderbilt's will and should be taxed in accordance with statutes in force at her death. Its inclusion in an estate tax, measured by the aggregate of the property transferred under her will, is not so unreasonable that it may be challenged in the courts.

The classification so made applies only to transfers under a limited power of appointment created by the will of a person dying prior to September 1, 1930. Transfers under such powers created by persons dying thereafter would be subject to a tax measured in a different way—and such tax might be higher or lower but would not be the same. That, it is said, denies to the taxpayer the equal protection of the law. In urging that contention the appellants lean heavily on the case of *Binney* v. *Long* (299 U. S. 280). In that case the Legislature based discrimination upon whether a transfer was made before or after a date which it arbitrarily chose. In the instant case the discrimination is not based upon a date arbitrarily selected but is a logical solution by the Legislature of a problem which it was required to meet. The discrimination, as we have already said, is between a transfer under a limited power of appointment theretofore granted and a transfer under such a power thereafter granted, and it was calculated to prevent transfers thereafter effected under powers theretofore granted from escaping all taxation. That is not an arbitrary discrimination.

Other objections raised by the appellants have been rejected after careful consideration. We do not extend this opinion further by detailed analysis.

The order of the Appellate Division should be affirmed, with costs.

O'Brien, Hubbs, Loughran, Finch and Rippey, J. J., concur; Crane, Ch. J., taking no part.

Order affirmed.

Supreme Court of the United States

OCTOBER TERM, 1939.

No. .....

GERTRUDE VANDERBILT WHITNEY and CORNELIUS VANDERBILT, as Executors of the Last Will and Testament of ALICE G. VANDERBILT, deceased, and said CORNELIUS VANDERBILT, individually, GLADYS SZECHENYI, CATHLEEN VANDERBILT LOWMAN, GLORIA LAURA MORGAN VANDERBILT, infant, and THOMAS B. GILCHRIST, as General Guardian of the property of said infant,

Appellants,

against

STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellee.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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Supreme Court of the United States

OCTOBER TERM, 1939.

GERTRUDE VANDERBILT WHITNEY and CORNELIUS VANDERBILT, as Executors of the Last Will and Testament of ALICE G. VANDERBILT, deceased, and said CORNELIUS VANDERBILT, individually, GLADYS SZECHENYI, CATHLEEN VANDERBILT LOWMAN, GLORIA LAURA MORGAN VANDERBILT, infant, and THOMAS B. GILCHRIST, as General Guardian of the property of said infant,

Appellants,

against

STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellee.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Pursuant to Rule 7 of the Revised Rules of this Court, the appellants in the above entitled case present this brief opposing the motion of appellee to dismiss or affirm.

I. The only issue raised by the motion is whether the questions involved have already been settled by this Court adversely to the appellants.

Where, as here, jurisdiction of this Court is invoked by appeal as of right, an argument as to the merits of the cause is out of place on a motion to dismiss or

affirm, and the appellants do not propose in this brief to present such an argument.

As the sole reason set forth in support of the motion is the want of a substantial federal question, the motion should be granted only if argument on the merits would be a waste of time, either because the questions involved are frivolous or because they have been foreclosed by prior decisions of this Court. *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311 (1902).

Appellee makes no contention that the questions presented are frivolous. Such a contention could scarcely have been made in the face of the declaration of the New York Court of Appeals that:

> "The serious question in this case is whether the tax violates the Constitution of the United States." (*Matter of Vanderbilt*, 281 N. Y. 297, 313.)

Appellee seeks to show, rather, that the questions have already been settled against the appellants by prior decisions of this Court. In this brief the appellants have therefore limited themselves to answering such contention.

II. The questions presented have not been settled adversely to the appellants by this Court.

a. **The due process question.** Appellants' first contention is that the due process clause of the Fourteenth Amendment does not permit the inclusion in the estate of a decedent, for the purpose of measuring a progressive estate tax, of property in which the decedent never had any beneficial interest, and with which the de-

cedent's only connection was that the decedent had, and exercised, a special or limited and wholly non-beneficial power of testamentary appointment. Appellee's contention on this motion is that this question is settled adversely to the appellants by *Orr* v. *Gilman*, 183 U. S. 278 (1902) and *Chanler* v. *Kelsey*, 205 U. S. 466 (1907).

These cases, however, are not in point. They both involved the old New York death tax statute which was completely superseded by the new statute involved in the present appeal. The former New York death tax was a legacy tax, by which we mean a tax imposed on the right of the recipient to receive property on a death, and measured by the amount of property so received. The present tax is an estate tax, by which we mean a tax imposed on the right of the decedent to transmit property at death, and measured by the amount of property so transmitted. While the terms used to describe these two wholly different kinds of death taxes are not uniform (see dissenting opinion of Mr. Justice Roberts in *Coolidge* v. *Long*, 282 U. S. 582 (1931) at 608), the fundamental distinction between the kind of tax to which we refer as a legacy tax and the kind to which we refer as an estate tax is well-established and has been repeatedly recognized by this Court. Thus, in the leading case of *Knowlton* v. *Moore*, 178 U. S. 41 (1900), the Court referred (p. 77) to the confusion which

> "arises from not keeping in mind the distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death, the two being different objects of taxation."

See also:

Y. M. C. A. v. *Davis,* 264 U. S. 47, 50 (1924);
Edwards v. *Slocum,* 264 U. S. 61, 62-3 (1924);
Saltonstall v. *Saltonstall,* 276 U. S. 260, 270-1 (1928).

The significance attributed to this distinction by Justices of this Court is strikingly shown by the cases of *Nichols* v. *Coolidge,* 274 U. S. 531 (1927) and *Coolidge* v. *Long,* 282 U. S. 582 (1931), which involved, respectively, a Federal estate tax and a Massachusetts legacy tax in respect of precisely the same property. In both cases the tax was held invalid, but in the *Nichols* case, involving an estate tax, Justices Holmes, Brandeis, Stone and Sanford concurred in the result, whereas in the *Long* case, involving a legacy tax, Justices Holmes, Brandeis and Stone joined with Mr. Justice Roberts in dissenting from the decision. The dissenting opinion in the *Long* case expressly distinguished the *Nichols* case on the ground that the *Nichols* case involved an estate tax rather than a legacy tax (see 282 U. S. at 609, 622-3).

In the present case, the distinction between a legacy tax and an estate tax is of decisive importance. Where a legacy tax is imposed on the exercise of a power of appointment by the grantee, it is immaterial whether the grantee of the power had, or had ever had, any beneficial interest in the property subject to the power, because the tax is imposed on the receipt of the property by the appointee and the property is not received by the appointee until the power has been exercised. The appointee cannot complain if the State

selects the exercise of the power as the occasion for the tax on his undoubted receipt of the property. And this is all that is decided by *Orr* v. *Gilman* and *Chanler* v. *Kelsey,* relied upon by appellee.

Where, however, an estate tax is being imposed, the treatment of appointed property as part of the estate being transmitted by the grantee of the power, for the purpose of an estate tax on the transmission of the grantee's estate, involves an assumption that the grantee stood in a relation to the property which may reasonably be treated as the substantial equivalent of ownership thereof. It is our contention that this assumption is erroneous and arbitrary in a case like the present where the grantee of the power had never owned the appointed property and where the power was a special or limited one and wholly non-beneficial.

Prior to the enactment of the tax statute here involved, the State of New York had never undertaken to impose an estate tax upon the exercise of a special or limited power of appointment. No estate tax upon the exercise of such a power has ever been imposed by the Federal Government.

In an effort to avoid the clear distinction between the *Orr* and *Chanler* cases and the present case, appellee cites a number of cases for the proposition that to sustain the validity of an estate tax "it is not necessary that the decedent own the property or be able to derive some economic benefit therefrom" (p. 2). However, in all of the cases cited, the property involved had once belonged to the decedent or had been paid for by him, and the decedent by one device or another had kept control over it up to the time of his death. Since, in each of these cases, the whole transaction was a sub-

stitute for a testamentary disposition by the decedent of his property, the imposition of the estate tax was justified on the principle that the Legislature might properly take measures reasonably required to prevent evasion of the tax. However, where, as in the present case, the decedent had never owned or paid for the property in question, there is no basis for the application of any such principle.

While this Court, by virtue of the principle just stated, has upon occasion sustained the inclusion in a decedent's estate, for the purpose of an estate tax, of property in which the decedent did not have any beneficial interest at death, *this Court has never, so far as we can find, sustained the inclusion in a decedent's estate, for the purpose of an estate tax, of property in which the decedent had never had any beneficial interest, either at death or at any previous time.* This appeal presents just such a case.

b. **The first equal protection question.** Appellants' second contention is that, even if the predication of a tax upon the arbitrary and erroneous factual assumption that the appointed property belonged to the decedent could be regarded as consistent with due process of law (so that the Federal Government might impose such a tax), nevertheless the tax statute is invalid under the stricter requirements of the equal protection clause because of the inequality produced by application of this factual assumption.

Appellee asserts that *Stebbins* v. *Riley*, 268 U. S. 137 (1925), negatives the contention that the equal protection clause subjects the States to an additional requirement of fairness and equality over and above

that which is required of both the State and Federal Governments by the due process clauses of the Fifth and Fourteenth Amendments. However, not only is there nothing in the *Stebbins* opinion to support such an assertion, but Mr. Justice Stone, who wrote for the Court in that case, has expressly stated the contrary view. *Heiner* v. *Donnan,* 285 U. S. 312, 338, 347-8 (1932) (dissenting opinion). As was said in *Truax* v. *Corrigan,* 257 U. S. 312, 332 (1921), where it was held that the equal protection clause forbade withdrawal of certain equitable remedies even if the due process clause allowed it:

> "The due process clause * * *, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty, and property, which the Congress or the Legislature may not withhold. * * * *But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause,* or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty." [Italics supplied.]

Appellee's quotation from the opinion in *Chase National Bank* v. *United States,* 278 U. S. 327, 338-9 (1929) has no bearing upon the appellants' first equal protection objection. Appellants do not contend, as appellee seems to believe, that even if the due process clause permits the appointed property to be considered as belonging to the decedent for estate tax purposes, an independent *due process objection* arises by reason of the fact that inclusion of the appointed property causes

the estate to fall into a higher tax bracket. Appellants contend, rather, that even if the due process clause offers no obstacle to such inclusion, there remains a question whether the discrimination so produced is compatible with the stricter requirements of the equal protection clause. This argument was not open to the taxpayer in the *Chase National Bank* case, which involved a federal tax; the equal protection clause does not run against the Federal Government. The specific guaranty of equal protection of the laws as contained in the Federal Constitution applies by its terms to the States, and it is a State tax statute which is involved in the present appeal.

c. **The second equal protection question.** Appellants' final contention is that the tax statute here involved violates the equal protection clause for another and separate reason: it results in the different treatment of two estates which are identical in all material respects, differing only in that one includes property passing under a special or limited power of appointment created before September 1, 1930, and the other includes property passing under a special or limited power created after that date.

Appellee points to the circumstance that on September 1, 1930, the old New York legacy tax system, which provided for taxation of the right to receive appointed property as of the time of the exercise of the power, was replaced by an estate tax system, under which the right to transmit property by way of a power of appointment was taxed in the estate of the donor of the power as of the time of his death; that by such new system no provision was made for taxation with

respect to special or limited powers theretofore created but not yet exercised; and that it was therefore necessary for the State to adopt some method of reaching property passing under special or limited powers created before and exercised after September 1, 1930, which would otherwise escape all taxation. Appellee then cites four decisions of this Court which hold (or suggest by way of dictum) that, in such a situation, the State can impose a special levy which, although it seems *prima facie* arbitrary and violative of the equal protection clause because it singles out a particular group of properties or transactions, is, in view of all the circumstances, lawfully appropriate to the end in view.

But these four cases stand only for the proposition that a State may adopt a classification based on the need to prevent particular types of property or transaction from *escaping* taxation, and to make them bear a fair share of the tax burden—a proposition which appellants do not feel called upon to deny.* The question is not whether the transfer of the appointed property can be subjected to *any* tax; the question is whether the tax imposed is a fair one. Certainly this Court has not held that, when seeking to close a loophole in a tax statute, a State may ignore the equal protection requirement to which it is subject in all other fields of action.

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* Indeed, appellants expressly urged in their briefs presented to the State Courts, that the appointed property not only *could* constitutionally be subjected to a legacy tax in relation to the estate of the donor of the power, but that as a matter of statutory construction, it should be so taxed. The appellants pointed out further that if such a tax should now be held to be due, it is not too late to collect it.

Appellee further states that *Binney* v. *Long*, 299 U. S. 280 (1936), is inapplicable here. Appellants believe that the *Binney* case is precisely in point, and that the alleged ground of distinction which appellee urges has as much application to the facts of the *Binney* case as to the situation here involved. However, for the purpose of the present motion, it is not necessary to enter into a detailed comparison of the two cases. It is sufficient to point out that the *Binney* case was a decision *against* the validity of a tax, and therefore cannot possibly be thought to foreclose the second equal protection question *against* the appellants.

For the foregoing reasons the appellants respectfully submit that the questions presented are clearly not frivolous and are not foreclosed by prior decisions of this Court, and that the case should therefore stand for argument on the merits.

Respectfully submitted,

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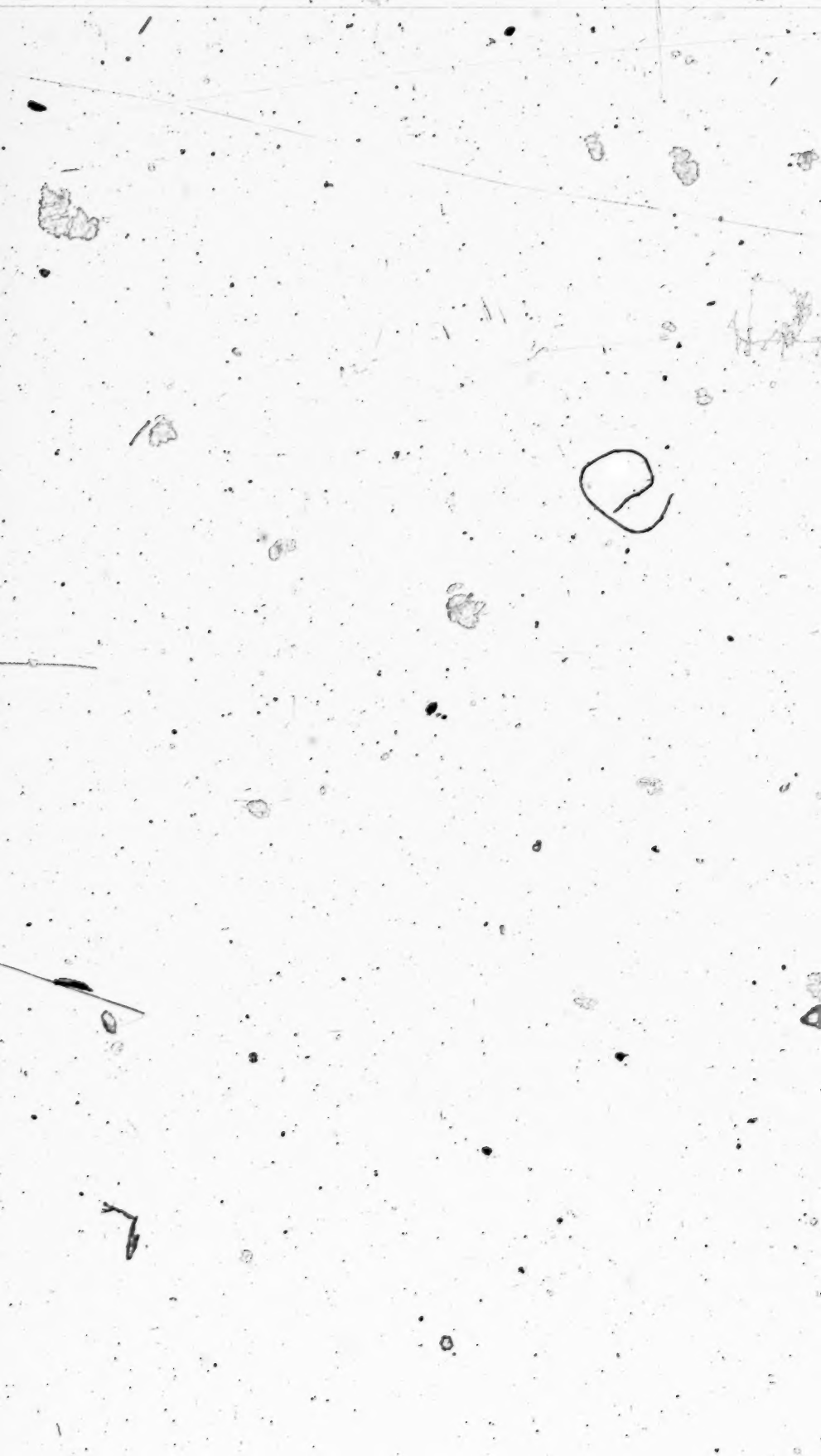

No. 541.

Supreme Court of the United States

OCTOBER TERM, 1939.

GERTRUDE VANDERBILT WHITNEY and CORNELIUS VANDERBILT, as Executors of the Last Will and Testament of ALICE G. VANDERBILT, Deceased, *et al.*,

Appellants,

vs.

STATE TAX COMMISSION OF THE STATE OF NEW YORK.

BRIEF FOR THE APPELLANTS.

ARTHUR A. BALLANTINE,
ROY C. GASSER,
THOMAS B. GILCHRIST,
HORACE R. LAMB,
LEO GOTTLIEB,
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Supreme Court of the United States

OCTOBER TERM, 1939.

GERTRUDE VANDERBILT WHITNEY and CORNELIUS VANDERBILT, as Executors of the Last Will and Testament of ALICE G. VANDERBILT, deceased, and said CORNELIUS VANDERBILT, individually, GLADYS SZECHENYI, CATHLEEN VANDERBILT LOWMAN, GLORIA LAURA MORGAN VANDERBILT, infant, and THOMAS B. GILCHRIST, as General Guardian of the property of said infant,

Appellants,

against

STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellee.

OPINIONS OF THE STATE COURTS

The opinion of the Surrogate (R. 66) is reported in 163 Misc. 667, 297 N. Y. Supp. 554. The opinion of the New York Court of Appeals (R. 86) is reported in 281 N. Y. 297, 22 N. E. (2d) 379.

JURISDICTION

The judgment of the Court of Appeals was rendered July 11, 1939 (R. 84). The appeal to this Court was taken October 10, 1939, and probable jurisdiction was noted by this Court in an order dated December 11, 1939. The jurisdiction of this Court rests upon Section 237(a) of the Judicial Code, as amended by the Acts of February 13, 1925, January 31, 1928 and April 26, 1928.

STATEMENT

The decision from which this appeal is taken sustained against constitutional objections the validity of an estate tax the measure of which included $5,285,572 of trust property (R. 15, 67) in which the decedent had never had any beneficial interest, either at death or at any other time. The sole connection of the decedent with such property was that she exercised a limited or special, and wholly non-beneficial, power of appointment over such property.

Alice G. Vanderbilt, the decedent in the present case, was the widow of Cornelius Vanderbilt. Cornelius Vanderbilt died on September 12, 1899, leaving a will whereby he created a trust for the payment of an annual income of $250,000 to his wife for her life. He gave the remainder of this trust fund to four of his children and their issue (and to any child born after his death) in such proportions as his wife might appoint in her will; in default of appointment, the trust fund was to be divided equally (R. 40).

The decedent was thus given authority to exercise a "*special power in trust*" within the meaning of the applicable New York statute (Real Property Law, Sections 135(1), 138(1)). She could not have exercised the power in any way for her own benefit; not only was she unable to appoint in favor of any persons except the four children or their issue, but, as the highest State Court has determined in this case, she was forbidden to seek or accept any reward or compensation for exercising the power in a particular way (R. 87). It is clear, therefore, that the decedent never had any beneficial interest in the remainder interest in the trust fund created by her husband's will, and it is

this remainder interest, ripened into full ownership by the extinction of the decedent's life interest, which is involved in the present case.

The decedent died on April 22, 1934, a resident of New York County (R. 9, 14). By her will she carried out the trust imposed on her by her husband's will, by exercising the limited power of appointment thus delegated to her. She appointed the remainder interest in the trust fund as follows (R. 30-1):

> $150,000 to her daughter Gertrude V. Whitney;
>
> $500,000 to the issue of her deceased son Alfred G. Vanderbilt;
>
> One-third of the balance to the issue of her deceased son Reginald C. Vanderbilt (Cathleen Vanderbilt Lowman and Gloria Laura Morgan Vanderbilt); and
>
> The remaining two-thirds of the balance to her daughter Gladys Szechenyi.

The entire trust property, valued at $5,935,572, was included in the decedent's taxable estate in the first instance by the Tax Appraiser (R. 15). In the Surrogate's Court, however, there was excluded from the taxable estate so much of the fund as had been appointed to Gertrude V. Whitney and the issue of Alfred G. Vanderbilt, *viz.*, $650,000, on the ground that these appointees received less than they would have received if the power of appointment had not been exercised, and therefore these appointees were to be deemed to have taken, not upon the exercise of the power by the decedent, but under the will of the grantor of the power (R. 67). See *Matter of Duryea*, 277 N. Y. 310 (1938). The balance of the appointed property, however, *viz.*, $5,285,572, was held by the

Surrogate to have been properly included in the decedent's taxable estate, and, after an intermediate appeal, this decision was affirmed by the State Court of last resort, the New York Court of Appeals (R. 84-5).

The total increase in tax resulting from the inclusion of such trust property in the decedent's taxable estate was about $852,000 (see pp. 38-9 below). Since the tax rate increases progressively with an increase in the total amount of the taxable estate, the aggregation of this property with the decedent's own property in determining the amount of the taxable estate has resulted in the application of higher rates in respect of all of the property included in the taxable estate. Thus, the tax in respect of the decedent's own property has been increased by approximately $163,000 by the application of the higher rates resulting from the inclusion in the taxable estate of the trust property (see p. 39 below). If the trust property had been taxed in the estate of the owner of the property, Cornelius Vanderbilt, who created the trust and granted the power of appointment, instead of being taxed in the estate of the decedent, the tax in respect of this property under the death tax statute in force at the time of the death of such owner (1899) would have been only about $30,000.

THE STATUTORY PROVISIONS

The tax was imposed under Article 10-C of the New York Tax Law (Cons. Laws, c. 60). This Article was enacted in 1930 (L. 1930, c. 710) and took effect on September 1, 1930. For all persons dying after that date, it substituted for the death tax previously in force in New York, which was a tax of the kind re-

ferred to in this brief as a *legacy tax*, a new death tax of the kind referred to as an *estate tax*. Although, as appears more fully below, the distinction between these two wholly different kinds of death tax is well recognized, the terms used to describe them are not uniform. (See dissenting opinion of Mr. Justice Roberts in *Coolidge* v. *Long*, 282 U. S. 582 (1931), at p. 608). Since the distinction is of great importance in the present case, it is well to make clear at the outset the terminology used in this brief to designate the two kinds of death tax.

The term "legacy tax" is used to refer to a death tax imposed upon the right of the recipient to receive property on a death, and measured by the amount of property so received. The term "estate tax" is used to refer to a death tax imposed upon the right of the decedent to transmit his property at death, and measured by the amount of property so transmitted. If a legacy tax is scaled at progressive rates, as virtually all death taxes now are, the rates advance as the amount received by any one beneficiary increases. In the case of a progressive estate tax, however, the rates advance as the total amount of the taxable estate, *i.e.*, the property transmitted by the decedent, increases. As phrased in the early leading case of *Knowlton* v. *Moore*, 178 U. S. 41 (1900), the distinction is between "a tax on the interest to which some person succeeds on a death", here called a legacy tax, and "a tax on the interest which ceased by reason of the death", here called an estate tax.

The estate tax enacted by Article 10-C was closely modeled upon the Federal estate tax law (R. 94). Like the Federal law, it contained a provision requiring the inclusion in the decedent's taxable estate of all

property over which the decedent had exercised a general power of appointment (§ 249-r, subd. 7). As originally enacted in 1930, however, Article 10-C did not purport to require the inclusion in the taxable estate of property, not otherwise a part of the decedent's estate, in respect of which the decedent had exercised only a special or limited power of appointment. This, again, followed the Federal law *which has never to this day contained any such provision.*

But in 1932 an amendment to Article 10-C was enacted adding a new subdivision, 7-a, to Section 249-r (L. 1932, c. 320), which, together with the introductory portion of Section 249-r, reads as follows:

> "§249-r. *Gross estate.* The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated (except real property situated and tangible personal property having an actual situs outside this state):
>
> "1. To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * * *
>
> "7-a. To the extent of any property passing under a power of appointment exercised by the decedent (a) by will, or (b) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth, exclusive of property the value of which is required to be included in the gross estate pursuant to paragraph numbered seven of this section, and provided that the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such

power but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof."

It is this 1932 amendment which has been held by the State Courts in this case to require the inclusion in the decedent's taxable estate of the trust fund above described (R. 96).

In order to consider this 1932 amendment in the light of the circumstances under which it was enacted, it is necessary that there be set forth a brief history of the previous treatment of powers of appointment for purposes of death taxation in the State of New York.

At the time of the death of Cornelius Vanderbilt, the grantor of the power, in 1899, the legacy tax law then in force in New York provided that all property subject to powers of appointment, whether the power was general or special, should be taxed upon the death of the grantee of the power, as though the property were received by the beneficiary from the grantee of the power, instead of from the grantor (§ 220, subd. 5, added by L. 1897, c. 284). By its terms, the statute required appointive property to be so taxed, *i.e.* in proceedings conducted in the estate of the grantee, whether or not the power was exercised. Subsequently, however, the statute was held unconstitutional in so far as it purported to make the legacy tax payable in the estate of the grantee of the power where the power was not exercised and the beneficiary received the property in default of appointment. *Matter of Lansing*, 182 N. Y. 238 (1905).

In conformity with this decision, the statute was amended in 1911 to provide for taxation in the estate

of the grantee of the power only in the event of exercise of the power; otherwise in the estate of the grantor of the power (§ 220, subd. 6, as amended by L. 1911, c. 732).

Even with this change, however, there was no provision for the case of a power exercised by the will of a grantee who was not a resident of the State of New York at the time of death. In such a case, no legacy tax at all would have been payable under the statute in respect of the property subject to the power: none in the grantor's estate, because the power had been exercised, and none in the grantee's estate, because the New York legacy tax law was not applicable to the estate of a non-resident grantee.

To meet this situation, the Legislature in 1926 provided that if the power should be exercised by the will of a grantee who was a non-resident of the State of New York at the time of death, the appointive property should be treated in the same way as if the power had not been exercised, *i.e.*, the legacy tax should be imposed in the estate of the grantor of the power (§ 220, subd. 4, as amended by L. 1926, c. 357).

A similar situation arose when Article 10-C was enacted repealing the legacy tax statute in respect of all persons dying after September 1, 1930, and substituting as to such persons the new estate tax law. The New York legacy tax statute thereby became inapplicable to the grantee of a power of appointment who died after September 1, 1930, even though such grantee was a resident of the State, and so no legacy tax in respect of the appointive property could be imposed in the estate of the grantee of the power in the event of exercise of the power by a resident grantee. The situ-

ation would seem to have called for treatment similar to that provided in 1926 with respect to the exercise of powers by non-residents, *viz.*, to provide that in each such case the property should be treated in the same way as if the power had not been exercised, *i.e.*, that the old legacy tax should be imposed in the estate of the grantor of the power.

Instead, however, of following this course, which would seem plainly indicated if adherence to a rational and consistent plan of taxation was desired, the Legislature chose to enact a unique and unprecedented statute, *i.e.*, the 1932 amendment above mentioned, singling out for special treatment a limited group of cases of property subject to powers of appointment, in which limited group the State Courts have held the property involved in the present case to be included.

There are no committee reports or published debates which throw any light on the reasons or motives of the Legislature in enacting this highly unusual statute. In 1930, when Article 10-C was enacted, the Legislature acted on the report of a specially appointed commission, known as the Commission to Investigate Defects in the Law of Estates, which had made a careful study of the subject. See *Matter of Cregan*, 275 N. Y. 337, 341 (1937). The 1932 amendment, however, was not recommended by this Commission, but was submitted to the Legislature as a so-called "Tax Department bill" (R. 52).

Tax Department bills "usually consist of ones which remedy discrepancies in the laws * * *. They are very seldom bills over which there would be any controversy" (R. 52). It is fair to assume, therefore, that the Tax Department bill which resulted in the 1932

amendment received only perfunctory attention in the Legislature and was passed on the assumption that it was of a minor administrative nature. There is no reason to suppose that the Legislature was aware that the bill represented a new departure in the field of estate taxation which had never before been attempted, either in the State of New York or by the Federal Government, whose system of estate taxation had previously been adopted by the State. Nor is there any reason to suppose that the Legislature was aware that the bill was inconsistent with the manner in which the Legislature had dealt with closely similar situations in 1911 and 1926.

All that has been found by way of explanation of the enactment of the 1932 amendment is a memorandum from Tax Department counsel to the President of the appellee Tax Commission, apparently written for the Governor after the bill had been passed, which reads as follows (R. 53):

"CHAPTER 320, LAWS 1932

Amending Section 249-r of the Tax Law by the addition of subdivision 7-a

"Under the inheritance tax laws in effect prior to September 1, 1930, where a person created a power of appointment, general, special or limited, provision was made that the property to which such power related should not be subject to death taxation in the estate of the grantor of the power in the event the power should be exercised, but should be taxable in the estate of the person exercising the power. Under the estate tax act in effect from 1925 to September 1, 1930, property transferred subject to general, special or limited powers of appointment

was subject to tax in the estate of the grantor of the power. The estate tax law which took effect on September 1, 1930 taxes the exercise of a general power of appointment, but does not tax the exercise of a special or limited power of appointment. For this reason, property now transferred by the exercise of a special or limited power of appointment created prior to September 1, 1930 may in some cases escape taxation in both the estate of the grantor and the estate of the grantee of the power. Equitably there should be one tax on property so transferred. This bill provides that property transferred by the exercise of a special or limited power of appointment shall be included in the decedent's gross estate for the purpose of the present estate tax in the event it is not taxable or has not been taxed in the estate of the grantor of the power and thus insures that one death tax will be imposed upon such property."

This memorandum ignores the fundamental differences between the considerations justifying, and the effect of, the old legacy tax and the new estate tax, and throws no light whatsoever on the reasons for not following what would seem to have been the plainly indicated course, *viz.*, to provide for the imposition of the old legacy tax in respect of such property in the estate of the grantor of the power, just as would be done either in the case of failure to exercise the power or in the case of exercise of the power by a non-resident decedent.

Not only is the 1932 amendment out of line with the general New York plan of taxation with reference to powers of appointment, but it is also inconsistent with the treatment of contingent remainders upon the shift in 1930 from a system of legacy taxation to a

system of estate taxation. At the time of the enactment of Article 10-C, there were many cases pending where persons had died at various times in the past leaving property subject to contingent remainders which had not yet fallen in, and where final determination of the legacy tax due under the old law had been postponed until the final destination of the legacy should be known, since the applicable rate of tax depended on consanguinity and on the total amount received from the particular decedent by any one recipient.

In the case of such contingent remainders, there was no attempt by the Legislature to impose the new estate tax in respect of any of the property subject to such contingent remainders. On the contrary, Article 10-C was so drawn as to continue the old legacy tax law in force as to such property (§ 249-mm, added by L. 1930, c. 710). That this effect was intentional is plainly shown by the enactment, together with Article 10-C, of an amendment of the legacy tax law providing for the immediate liquidation of the suspended legacy tax in such cases, at the option of the taxpayer, by the making of a compromise payment in the amount of the average of the highest and lowest legacy tax which could ultimately become due (§ 233, as amended by L. 1930, c. 711).

SPECIFICATIONS OF ERRORS TO BE URGED

The appellants intend to urge all of the errors described in their assignment of errors (R. 108).

SUMMARY OF ARGUMENT

I. The appellants' first contention is that the statute as applied in this case deprives them of their

property without due process of law in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

II. The appellants' second contention is that, even if the statute here were applicable to all non-general powers of appointment whenever created, the imposition of the tax here in question would deprive the appellants of the equal protection of the laws, likewise in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

III. The appellants' third and final contention is that the applicability of the statute only to non-general powers of appointment created before September 1, 1930, constitutes an additional and separate ground of invalidity under the equal protection clause of the Fourteenth Amendment.

POINT I

THE STATUTE AS APPLIED IN THE PRESENT CASE DEPRIVES THE APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

An estate tax statute which requires the inclusion of property in the decedent's taxable estate merely because the decedent exercised a power of appointment over such property, constitutes an arbitrary and capricious allocation of the tax burden where, as in this case, the power of appointment is not a general power but only a limited power which the decedent was precluded from exercising for the benefit of herself, her creditors or her estate, and the property subject to the power is property which has never at any time belonged to the decedent.

In such a case, no justification for the tax can be found in a legislative purpose to prevent evasion or avoidance of the tax, such as justifies the inclusion in the taxable estate of property transferred in contemplation of death or to take effect at death, or any other property which once belonged to the decedent where the transaction, viewed as a whole, may fairly be regarded as a substitute for a testamentary disposition by the decedent. The tax in the present case could only be rested upon the assumption that the decedent stood in a relationship to the property here involved which was the practical equivalent of ownership, and on the undisputed facts of this case, as conclusively determined by the State Courts, this assumption is erroneous and arbitrary.

The appellants' contention does not rest upon any insistence on technical rules as to title—the recondite learning of ancient property law—or upon any claim that the Legislature is powerless to look through form to substance. The appellants recognize that substance, not form, must be regarded.

The appellants contend, however, that, giving full effect to substance rather than form, the treatment as part of the decedent's estate, for the purpose of measuring a progressive estate tax on the transmission of her estate, of property which the decedent never owned, either in a technical or a practical sense and either at death or at any previous time, necessarily involves an assumption of fact which is arbitrary and capricious and necessarily results in an allocation of the tax burden which is so devoid of any rational justification as to be contrary to the fundamental conceptions which underlie our form of government and are guaranteed by the due process clause.

a. **An estate tax cannot constitutionally be measured by property in which the decedent has never at any time had any beneficial interest.**

This Court is thoroughly familiar with the distinction between a legacy tax, which is a tax imposed on the right of a recipient to receive property on a death, and an estate tax, which is a tax imposed on the right of the decedent to transmit his property at death. See, for example, *Knowlton* v. *Moore,* 178 U. S. 41, 49, 77 (1900); *Y. M. C. A.* v. *Davis,* 264 U. S. 47, 50 (1924); *Edwards* v. *Slocum,* 264 U. S. 61, 62-3 (1924).

(1) *There may properly be included in the measure of an estate tax property not technically owned by the decedent at death if the decedent stood in a relationship to the property which might fairly be regarded as the equivalent of ownership.*

It follows from the very nature of an estate tax that basically the tax must be measured by the property owned by the decedent and transmitted to his heirs and legatees upon his death. This does not mean, however, that the decedent must have owned property in a technical title sense in order for it to be proper to include it in the measure of an estate tax. It is sufficient that the decedent stood in a relationship to the property which, as a practical matter, might fairly be regarded as the equivalent of ownership.

Thus, the inclusion in the measure of the tax of property in respect of which the decedent exercised a general power of appointment is valid although in a technical sense property subject to such a power is not owned by the grantee of the power. *Bullen* v. *Wisconsin,* 240 U. S. 625 (1916). But, as has been pointed out

by Circuit Judge Parker in *Leser* v. *Burnet*, 46 F. (2d) 756 (C. C. A. 4th, 1931), this is true only because a general power of appointment gives the grantee of the power the substantial equivalent of ownership, since he is free to exercise the power in favor of his creditors and thus use the property for his own benefit.

In the *Leser* case, which involved the question whether the decedent had exercised a general power of appointment within the meaning of the Federal estate tax law, the power was general on its face, but under the applicable Maryland law, a grantee of a power of appointment had no right to appoint to his own creditors unless this right was specifically granted, which had not been done in the case at issue. In holding that the appointed property should be excluded from the grantee's taxable estate, the Court, through Judge Parker, said (pp. 759-60):

> "Except that the donee of a general power may exercise it in favor of his creditors and thus use the property which is the subject of the power for his own use and benefit, there is no basis for including in his taxable estate property which is subject thereto; for this right is all that passes from his estate by reason of his death. * * * Nothing passes or is transferred from the estate of the donee in the case of a naked or special power of appointment, and Congress has recognized this fact by not requiring that property passing under a special power be included in the estate. It is only property subject to a general power—property of which the donee might have obtained the benefit by subjecting it to the payment of his debts—which is required to be included.
>
> * * * * * * *

> "It thus appears that the purpose of Congress was to tax property in relation to which the donee of a power stands in a position not unlike that of owner, property over which he exercises the same authority as he does over that which he owns. This could be said of property which he could subject to the payment of his debts. It could not be said of a naked power which he could not exercise for his own benefit or for the benefit of his estate."

To the same effect, see also *Fidelity-Philadelphia Trust Co.* v. *McCaughn,* 34 F. (2d) 600, 604 (C. C. A. 3d, 1929), cert. denied 280 U. S. 602; *cf. Morgan* v. *Commissioner,* U. S. Sup. Ct., Oct. Term, 1939, No. 210, decided Jan. 29, 1940.

Another instance of the inclusion in the measure of an estate tax of property not technically owned by the decedent because the decedent in a practical sense had the substantial equivalent of ownership, is the case of the proceeds of insurance policies taken out by the decedent on his own life. If the decedent at death retains the power to change the beneficiary, surrender the policy and borrow on it, it is proper to require the proceeds of the policy to be included in the decedent's taxable estate for the purpose of an estate tax. *Chase National Bank* v. *United States,* 278 U. S. 327 (1929).

It should be noted, however, that although the insurance provisions of the Federal estate tax law * would seem on their face to require the inclusion of the

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* Revenue Act of 1926, §302-g, reading as follows:

> "To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

proceeds of *all* insurance policies taken out by the decedent on his own life (subject only to a $40,000 exemption in the case of policies payable to a beneficiary other than the decedent's executor), the statute has consistently been held *not* to require the inclusion of the proceeds of any policy in which the decedent at death had no beneficial interest. *Helvering* v. *Parker*, 84 F. (2d) 838 (C. C. A. 8th, 1936); *Pennsylvania Co.* v. *Commissioner*, 79 F. (2d) 295 (C. C. A. 3d, 1935), cert. denied 296 U. S. 651; *Levy's Estate* v. *Commissioner*, 65 F. (2d) 412 (C. C. A. 2d, 1933); *McKelvy* v. *Commissioner*, 82 F. (2d) 395 (C. C. A. 3d, 1936); *Ballard* v. *Helburn*, 9 F. Supp. 812, affd. 85 F. (2d) 613 (C. C. A. 6th, 1936). These decisions, which are entirely consistent with the earlier *Chase National Bank* case, have been accepted by the Treasury Department and their holding has been incorporated in its regulations (T. D. 4729, approved March 18, 1937; Reg. 80, Art. 25).

(2) *The necessity of preventing evasion or avoidance of the tax permits the inclusion of property once owned by the decedent in various types of cases where the transaction as a whole may fairly be regarded as a substitute for a testamentary disposition.*

The measure of an estate tax may properly include property which at death the decedent did not own in any sense, technical or practical, if the statutory provision requiring the inclusion of such property is reasonably appropriate to a legislative purpose to prevent evasion or avoidance of the tax.

It is this principle which permits the inclusion in the decedent's taxable estate of property which the decedent at death no longer owns but which he has

previously transferred in contemplation of death or to take effect at or after death. *United States* v. *Wells*, 283 U. S. 102 (1931). In that case, involving the Federal estate tax law, this Court, through Mr. Chief Justice Hughes, said (pp. 116-17):

> "The quality which brings the transfer within the statute is indicated by the context and manifest purpose. Transfers in contemplation of death are included within the same category, for the purpose of taxation, with transfers intended to take effect at or after the death of the transferor. The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax."

This same principle justifies the inclusion of property in the measure of an estate tax in a variety of situations where the property had once belonged to the decedent and the transaction viewed as a whole, may fairly be regarded as the equivalent of a testamentary disposition by the decedent. Examples of such situations are: *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 (1929), where the decedent during his lifetime had transferred the property in trust but had retained until his death a right to revoke the trust; *Helvering* v. *City Bank Co.*, 296 U. S. 85 (1935), where a right of revocation in conjunction with one of the beneficiaries had been retained by the decedent; *Porter* v. *Commissioner*, 288 U. S. 436 (1933), where the decedent had retained control of the disposition of the property until his death through the reservation to himself of a power to modify the trust except in his own favor; *Tyler* v. *United States*, 281 U. S. 497 (1930), where the decedent had placed his property in a

tenancy by the entirety; and *United States* v. *Jacobs*, 306 U. S. 363 (1939), where the decedent had placed his property in a joint tenancy.

In all such cases, the decedent had once been the owner of the property and had utilized some device which in substance accomplished a testamentary disposition by the decedent of his own property notwithstanding that in form the decedent had divested himself of the property prior to his death. In such cases, it is often a close question whether the statutory provision in question, requiring the inclusion of the property in the decedent's taxable estate, falls on one side or the other of the line of measures reasonably appropriate to the legislative purpose to prevent evasion or avoidance of the estate tax. Thus, in *Helvering* v. *City Bank Co.*, 296 U. S. 85 (1935), cited above, the Court said (p. 90):

> "A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another status falling normally within the scope of the taxing power, *if reasonably requisite to prevent evasion*, does not take property without due process. But if the means are unnecessary or inappropriate to the proposed end, are unreasonably harsh or oppressive, when viewed in the light of the expected benefit, or arbitrarily ignore recognized rights to enjoy or to convey individual property, the guarantee of due process is infringed." (Italics supplied.)

Cf. Helvering v. *Helmholz*, 296 U. S. 93 (1935); *Helvering* v. *Hallock*, U. S. Sup. Ct., Oct. Term, 1939, Nos. 110, 111, 112, 183, and 399, decided Jan. 29, 1940.

Where, however, the property in question has *never* belonged to the decedent, a requirement that the prop-

erty be included in his taxable estate for purposes of an estate tax cannot in any case be justified on the basis of a legislative purpose to prevent evasion or avoidance of the estate tax. The question whether a particular measure is reasonable or appropriate to such a legislative purpose does not arise, because, if the decedent has *never* owned the property, the legislative purpose cannot possibly have been to prevent him from evading or avoiding an estate tax on his estate by the use of some device which would in substance accomplish a testamentary disposition by him of his property. In such a case, there is wholly lacking the basic foundation for the principle here under consideration.

(3) *Where the decedent has never had any beneficial interest in the property in question, either at death or at any previous time, the inclusion of the property in the decedent's taxable estate for purposes of an estate tax is contrary to due process of law.*

In such a case, the tax can be based only upon an arbitrary assumption which is unfounded in fact, and it is well settled that a tax resting upon an arbitrary and erroneous factual assumption constitutes a denial of due process of law. *Heiner* v. *Donnan*, 285 U. S. 312 (1932); *Hoeper* v. *Tax Commission*, 284 U. S. 206 (1931); *Schlesinger* v. *Wisconsin*, 270 U. S. 230 (1926); *Nichols* v. *Coolidge*, 274 U. S. 531 (1927); *Frew* v. *Bowers*, 12 F. (2d) 625 (C. C. A. 2d, 1926).

The *Donnan* case above cited involved the validity, under the due process clause, of a provision in the Federal estate tax law to the effect that a transfer of property made by the decedent within two years prior

to his death should be "deemed and held to have been made in contemplation of death". The Court held this provision invalid as a denial of due process of law, saying (285 U. S. 327):

> "The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description. Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the *Schlesinger* and *Hoeper* cases condemn as arbitrary and a denial of due process of law. Such an exaction is not taxation but spoliation."

The *Schlesinger* case involved the validity, under the due process clause, of a similar conclusive presumption in a legacy tax law of the State of Wisconsin, the period in this case, however, being six years instead of two.

In the *Hoeper* case, the Court held invalid, under the due process clause, a provision of an income tax law of the State of Wisconsin to the effect that the income of a husband should be deemed to include the income of his wife. In so holding, the Court, through Mr. Justice Roberts, said (284 U. S. 215):

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made

such by calling it income. Compare *Nichols* v. *Coolidge*, 274 U. S. 531, 540."

While the *Donnan*, *Schlesinger* and *Hoeper* cases were each decided by a divided Court, none of the Justices of this Court who dissented in these cases questioned the soundness of the principle for which these cases are cited; they merely took the position that, in these instances, the principle was inapplicable. Mr. Justice Stone disagreed with the decision in the *Donnan* case on the ground that the conclusive presumption provision could be sustained as imposing a gift tax designed to prevent evasion or avoidance of the estate tax (see 285 U. S. at pp. 335, 338 *et seq.*). Similarly, in the *Schlesinger* case, Mr. Justice Holmes rested his dissent on the ground that the conclusive presumption provision might reasonably have been thought necessary to prevent evasion or avoidance of the estate tax (see 270 U. S. at p. 242). And in the *Hoeper* case, Mr. Justice Holmes argued for the validity of the tax on the ground that a husband might reasonably be thought to derive a benefit in fact from his wife's income (see 284 U. S. at pp. 219-20).

Certainly this Court has never held, or even suggested, so far as has been discovered, that property which the decedent had never owned might properly be included in his taxable estate for purposes of an estate tax, merely because he exercised a limited and non-beneficial power of appointment over such property.

It is clear that those responsible for Federal tax legislation have not believed that an estate tax law could validly require the inclusion of such property. Notwithstanding that the Federal estate tax law

has for many years, ever since the Revenue Act of 1918, required the inclusion in the decedent's taxable estate of property passing under a general power of appointment exercised by the decedent, there never has been any attempt to require the inclusion of property in respect of which the decedent has exercised only a limited and non-beneficial power. If it were believed that such a requirement would be valid, it hardly seems likely that any such source of additional revenue by the estate tax method would have been overlooked.

It is likewise significant that when the New York estate tax law was enacted in 1930, on the recommendation of a learned commission which had made a careful study of the subject (see p. 9 above), no such provision was inserted in the new law, either. It was not until the enactment of the 1932 amendment, which is involved in the present case, that any attempt was made to require the inclusion of such property in the measure of the tax, and then only in the restricted group of cases to which such amendment by its terms is limited.

Since there has been no previous attempt to require the inclusion in the measure of an estate tax of property in which the decedent had never had any beneficial interest either at death or at any previous time, it is of course impossible to cite any decision in which it was specifically held that such a requirement constitutes a denial of due process of law. It is believed, however, that this result necessarily follows from the other decisions to which reference has been made above.

b. The decedent in the present case has never at any time had any beneficial interest in the property here involved.

The property here involved is the remainder interest in the trust created by the will of Cornelius Vanderbilt. The only connection of the decedent with such property is that she had and exercised a limited power of appointment over such property of a kind which, under the applicable State law, constituted a special power in trust giving the decedent no beneficial interest whatsoever in such property. A determination to this effect on this question of State law has been made by the New York Court of Appeals in this case, in the following language (R. 87-8):

> "*The property* which was included in Mrs. Vanderbilt's estate (*i.e.*, the appointed property here in question) *did not at any time belong to her.* It did not at her death pass from her to those whom she appointed to take. Her power of appointment was not general. *By its exercise she could obtain no benefit for herself, her creditors or her estate.* During her life the fund was held by trustees under the terms of the will of Cornelius Vanderbilt. She enjoyed under his will a life interest in the fund, and a tax measured by the value of that life interest was paid upon the death of Cornelius Vanderbilt. The remainder, which would vest in others upon her death, was not included in the tax assessed upon the transfer of his property. Mrs. Vanderbilt might, by exercise of her power of appointment, determine the shares which members of a limited group defined by the will of Cornelius Vanderbilt should receive out of property in the estate of Cornelius Vanderbilt and held by trustees under his will. *When she exercised*

that power she gave her appointees nothing which belonged to her and she relinquished no rights which she might have asserted for herself." (Parenthetical clause and italics supplied.)

On familiar principles, this determination by the highest Court of the State on this question of State law is conclusive.

It is clear that in stating that the property here involved "did not at any time belong to" the decedent, the Court of Appeals is not referring merely to ownership in a technical sense. The remainder of the quoted excerpt and various other passages in the opinion make it clear that the Court's determination is that the decedent did not at any time have any beneficial interest in the property.

It is true that in reaching its conclusion that the "unfairness" of the tax here imposed was not such as to render the statute invalid (R. 99), the Court speaks of a "practical transfer" (R. 97) of this property by the decedent, and states that this property "was in a practical sense transferred by the will of the grantee of the power" (R. 97-8). These statements will be discussed further below, under a subsequent subdivision of this Point I. But it should here be noted that in making these statements, the Court is not in any way suggesting that this property belonged to the decedent, even in a practical sense; on the contrary, the Court clearly recognizes that this property which, it says, was "in a practical sense" transferred by the will of the decedent, was the property of some one else, not of the decedent (see R. 98-9).

Consequently, if it is true, as the appellants contend, that the due process clause does not permit the

inclusion in the measure of an estate tax of property in which the decedent had never had any beneficial interest, either at death or at any previous time, the conclusion seems inescapable that the statute here in question, as applied in the present case, cannot be sustained.

c. **The fact that upon the death of this decedent a legacy tax might have been imposed upon the receipt of this property by the appointees does not justify the tax here in question.**

The appellants concede that if we were here dealing with a legacy tax on the receipt by the appointees of the property here involved, measured by the amount received by the appointees respectively, none of the appointees could complain of the Legislature's selection of the exercise of the power by the grantee as the occasion for the imposition of the tax on his undoubted receipt, at that time, of the property appointed to him. Such is the holding of *Orr* v. *Gilman,* 183 U. S. 278 (1902), affirming *Matter of Dows,* 167 N. Y. 227 (1901), and *Chanler* v. *Kelsey,* 205 U. S. 466 (1907), affirming *Matter of Delano,* 176 N. Y. 486 (1903).

Since the gift is incomplete, so far as the appointee is concerned, until the power has been exercised by the grantee, a tax on his receipt of the property is not retroactive if enacted before the exercise of the power. Thus, in *Chanler* v. *Kelsey,* cited above, the Court said (205 U. S., at pp. 473-4):

> "However technically correct it may be to say that the estate came from the donor and not from the donee of the power, it is self-evident that it was only upon the exercise of the power that the estate in the plaintiffs in error [the appointees] became complete."

But the appellants have never taken, and do not now take, the position that the tax here in question is invalid because it was too late, when the statute here was enacted, to impose *any* tax. Their position is simply that the tax which was actually imposed is so arbitrary and so inconsistent with any rational plan of taxation, that it cannot stand under the due process clause.

This Court has repeatedly pointed out, in effect, that the question whether a legacy tax may be validly imposed under particular circumstances is a wholly different question from the question whether an estate tax may be validly imposed under the same circumstances. See, for example: *Nichols* v. *Coolidge*, 274 U. S. 531, 541 (1927); *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270-1 (1928); *Coolidge* v. *Long*, 282 U. S. 582, 608, 609, 631-2 (1931); *cf. Knowlton* v. *Moore*, 178 U. S. 41, 49, 77 (1900); *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50 (1924); *Edwards* v. *Slocum*, 264 U. S. 61, 62-3 (1924).

The significance attributed to this distinction by Justices of this Court is strikingly shown by the cases of *Nichols* v. *Coolidge* and *Coolidge* v. *Long*, cited above, which involved, respectively, a Federal estate tax and a Massachusetts legacy tax in respect of precisely the same property. In both cases the tax was held invalid, but in the *Nichols* case, involving an estate tax, Justices Holmes, Brandeis, Stone and Sanford concurred in the result, whereas in the *Long* case, involving a legacy tax, Justices Holmes, Brandeis and Stone joined with Mr. Justice Roberts in dissenting from the decision. The dissenting opinion in the *Long* case expressly distinguished the *Nichols* case on the

ground that the *Nichols* case involved an estate tax rather than a legacy tax (see 282 U. S. at 609, 622-3).

Where a legacy tax is being imposed on the exercise of a power of appointment, it is immaterial whether the grantee of the power had, or had ever had, any beneficial interest in the property subject to the power. The tax is imposed on the receipt of the property by the appointee and is measured by the property which the appointee receives. There is no question but that the appointee does in fact receive the property by which the tax is measured. There is also no question but that he does not in fact receive it until the power has been exercised. The imposition of the tax at the time of the exercise of the power, instead of at the time of the death of the grantor of the power, may result in the application of higher rates where, as is sometimes the case, the rates have been increased between the time of the death of the grantor of the power and the time of the exercise of the power. But where the tax is on the receipt of property, the application of rates in force at the time when the property is actually received cannot be regarded as arbitrary, and may even be thought to be more fair than the application of earlier rates.

Where, however, it is sought to impose an *estate* tax upon the exercise of a power of appointment, the question whether the grantee of the power had, or had ever had, any beneficial interest in the property subject to the power, is of controlling importance. Since the tax is imposed on the transmission of the grantee's estate, and is measured by the total amount of that estate, to whomsoever and in what proportions it may be transmitted, the treatment of the appointed property as part of the grantee's estate for the purpose of

measuring the tax is wholly arbitrary where there is no basis in fact for so regarding the property. Where, as in the present case, the grantee of the power had never owned the appointed property (so that the principle of preventing evasion or avoidance is inapplicable), and the power is a special power in trust which the grantee was precluded from exercising for the benefit of herself, her creditors or her estate (so that there is no basis for an assumption that the grantee stood in a relation to the property which was the practical equivalent of ownership), there is no rational justification whatsoever for an estate tax measured by treating the appointed property as part of the grantee's estate.

The difference between the two situations, *i.e.*, the imposition of a legacy tax upon the receipt of appointed property upon the exercise of a non-beneficial power and the inclusion of such property in the taxable estate of the grantee for purposes of an estate tax, is not a mere matter of legal theory, of no practical consequence, but is a matter of real substance. That this is so is well shown by the facts of the present case.

If in this case a legacy tax had been imposed in respect of the appointed property, and if the taxing statute had prescribed a progressive scale of rates identical with the rate scale prescribed in the actual estate tax law here in question, the legacy tax would be measured in the case of each appointee by the property appointed to such appointee (together with any other property received by the appointee from this decedent), and the applicable rates in the progressive scale would be determined accordingly. The estate tax, on the other hand, is measured not by the property appointed to any one appointee, nor even by the aggregate of all of the property appointed to all of the ap-

pointees, but by the aggregate of all of the appointed property and all of the decedent's own property. Such aggregation results in the application of substantially higher rates in the progressive rate scale. By reason of such aggregation, the portion of the estate tax imposed in the present case which corresponds in ratio to the total amount of the appointed property included in the decedent's taxable estate (about $685,000), is approximately $315,000 in excess of the total legacy tax which would have been imposed in respect of such property under a legacy tax statute containing an identical scale of progressive rates.

Furthermore, the balance of the estate tax imposed in this case, *i. e.*, the portion (about $525,000) corresponding in ratio to the total amount of the decedent's own property, is approximately $165,000 in excess of the total estate tax (about $360,000) which would have been payable in this case under the statute here in question if a legacy tax had been imposed in respect of the appointed property instead of treating such property as part of the decedent's taxable estate for the purpose of this estate tax (*cf.* R. 67).

These consequences of the imposition here of an estate tax in respect of the appointed property, instead of a legacy tax, are not set forth as supplying any reason in themselves for invalidating the tax. If there were some rational justification for treating the appointed property as part of the decedent's taxable estate, those who bear the burden of the tax in respect of the decedent's own property could not complain of the increase in their tax burden resulting from the aggregation of which mention has been made. But where, as here, the aggregation rests upon an erroneous and arbitrary assumption of fact, it becomes rele-

vant to inquire whether the resulting differences in tax burden are trivial or substantial. The illustrations given sufficiently show, it is believed, that these differences are substantial.

It is no answer to say that a State has discretion, within very broad limits, as to the rate of tax, and that the difference in consequences between the estate tax here involved and a legacy tax is no more disadvantageous to those bearing the burden of the tax than would be an increase in the rate. This Court has squarely held that a State may not include in the measure of a death tax property in respect of which it had no power to impose the tax in question even though the effect of such inclusion is no different than would be a tax at a higher rate measured solely by property in respect of which the State did have power to impose the tax. *Frick* v. *Pennsylvania*, 268 U. S. 473 (1925).

d. **No adequate ground for sustaining the tax here in question can be found in the opinion of the New York Court of Appeals.**

The New York Court of Appeals recognizes that we are here dealing with an estate tax which must be distinguished from a legacy tax, and that the differences between a legacy tax and an estate tax "are not merely theoretical" (R. 93-4).

Nevertheless, the Court's ultimate conclusion that the estate tax here in question "is not so unreasonable that it may be challenged in the courts" (R. 99), is fundamentally based upon the decisions already discussed above (pp. 27 *et seq.*) sustaining the imposition of a legacy tax in respect of property appointed under a non-beneficial power at the time of the exercise of such power. The Court twice quotes from its own opinion in one of these decisions, *Matter of Delano*,

176 N. Y. 486, 494, a statement that in the case of such a tax, "it is the practical transfer through the exercise of the power by will that is taxed and nothing else" (R. 92, 97). It is this statement which is the source of the statements in the present opinion to which reference has been made above (p. 26) to the effect that there was a "practical transfer" of the appointed property here when the decedent exercised the power by her will (R. 97-8).

From this, the Court reasons that the "Legislature was free at that time to impose a tax upon such transfer" (R. 97). And up to this point, as has already appeared, there is no divergence between the views expressed by the Court of Appeals and the position taken by the appellants.

Thereupon, however, the Court takes the next step, although not without some obvious difficulty, *viz.*, that when the Legislature chose to impose an estate tax, "measured by the aggregate of the property transferred under her will" (R. 99), "even though the decedent did not own some of the property but merely had a limited power of appointment" (R. 98), this was not "entirely without basis in fact" (R. 98), and while "argument can be made that such a tax is not fair" (R. 98), such "'unfairness' does not, however, render the statute invalid" (R. 99).

Heiner v. *Donnan*, 285 U. S. 312 (1932), cited above, is distinguished by the Court of Appeals on the ground that in the *Donnan* case, "by arbitrary choice to include in the 'estate' of the decedent property which did not pass at the decedent's death to which the estate was in no way related and from which the estate derived no benefit, the Legislature increased the rate of taxation upon the transfer of property which the de-

cedent owned and transmitted," whereas in the present case, "no property is included in the aggregate which measured the tax which does not pass at Mrs. Vanderbilt's death to persons who take the property only because she so provided in her will" (R. 98).

With all respect, it is submitted that this reasoning cannot be considered as supplying a satisfactory ground for sustaining the tax here in question. It fails to take account of the fact that in exercising the special power in trust granted to her in the will of her husband, the decedent was merely acting as her husband's fiduciary agent in connection with the disposition of *his* property. The circumstance that the decedent performed her fiduciary function with reference to her husband's property by means of the same instrument by which she disposed of her own property, surely cannot be regarded as a sufficient basis for including her husband's property in the measure of a tax on the transmission of the decedent's estate. So to regard this circumstance would seem wholly inconsistent, not only with the nature of the tax with which we are dealing, but also with the principle, so firmly established in this Court, that in considering the validity of a taxing statute, substance, not form, must be given effect.

From the standpoint of a tax on the receipt by each appointee of his share of the appointed property, the act of the decedent in exercising the power may, with some justification perhaps, be termed a "practical transfer" of the property to the appointees, since the property would have been received in different proportions by the appointees if the decedent had exercised the power differently or not at all. But from the standpoint of an estate tax on the transmission of

the decedent's estate, the proportions in which the appointees receive appointed property which never belonged to the decedent is a wholly immaterial circumstance. The measure of an estate tax does not depend upon the persons by whom the estate is received nor upon the proportions in which they receive it. Whatever justification there may be for regarding the exercise of the power in the present case as a "practical transfer" *to the appointees,* there is no justification whatever for regarding it as a "practical transfer", or any other kind of a transfer, *from the decedent.* As the Court of Appeals itself says, the property involved "did not at any time belong to her" (R. 87); when she exercised the power, "she gave her appointees nothing which belonged to her" (R. 88). From the standpoint of an estate tax on the transmission of the decedent's estate, only transfers *from the decedent* are significant (*cf.* Mr. Justice Stone, for the Court, in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 (1929) at p. 348).

Accepting as authoritative the test laid down in the *Donnan* case (as quoted above at p. 22) as the Court of Appeals purports to do (R. 98) it seems utterly impossible to sustain the tax imposed in the present case. At least as clearly as in the *Donnan* case, the tax here has been "measured in part by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description" (285 U. S. 327). Indeed, in the *Donnan* case, the property involved had admittedly been the property of the decedent not long before his death; in the present case, the property involved had never at any time been the property of the deceased.

The conclusion that the statute here in question is incompatible with the freedom from capricious official action which is guaranteed by the due process clause, is strongly re-enforced by the circumstances under which the enactment of the statute, *i.e.*, the 1932 amendment, was brought about. These circumstances are outlined in the introductory portion of this brief (pp. 7-12) and they indicate that the unusual nature and oppressive effect of the statute were not brought to the attention of either the Legislature or the Governor. Such circumstances go a long way in themselves toward rebutting the presumption of validity to which every statute is entitled when its constitutionality is under consideration in this Court. Furthermore, the explanation of the reasons for the statute which has been given by the administrative agency with which it originated (see memorandum set forth above, pp. 10-11), tends strongly to confirm the view that the statute, as applied in the present case, is so devoid of rational justification as to be plainly inconsistent with due process of law.

POINT II

EVEN IF THE STATUTE WERE APPLICABLE TO ALL NON-GENERAL POWERS OF APPOINTMENT WHENEVER CREATED, THE IMPOSITION OF THE TAX HERE IN QUESTION WOULD DEPRIVE THE APPELLANTS OF THE EQUAL PROTECTION OF THE LAWS.

The appellants complain not only of the failure to follow due rational process in imposing the tax in question, but also of the discriminatory result of such failure. Under Point I, attention was directed to the lack of rational method condemned by the due process clause; under this Point II, there will be noted the unreasonable discrimination thereby brought about.

a. **The equal protection clause imposes a more exacting requirement of fairness than does the due process clause.**

The equal protection clause has no counterpart in the Fifth Amendment and is, therefore, inapplicable to Federal action. A state statute, however, must be consistent both with the due process clause and with the equal protection clause. The same state statute may infringe both clauses. However, a state statute which is not so arbitrary as to be condemned by the due process clause may, nevertheless, be sufficiently oppressive or unequal in effect as to fail to conform with the more stringent standard to which the States are bound by the equal protection clause.

As was said by Chief Justice Taft, for the Court, in *Truax* v. *Corrigan*, 257 U. S. 312 (1921), where it was held that the equal protection clause forbade withdrawal of certain equitable remedies even if the due process clause allowed it (pp. 331-2):

> "The [equal protection] clause is associated in the Amendment with the due process clause and it is customary to consider them together. *It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous.* * * * The due process clause * * *, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold. * * * But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process

clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

"The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination *or the oppression of inequality*, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. * * *" (Italics supplied.)

See also *LaBelle Iron Works* v. *United States*, 256 U. S. 377, 392 (1924); *Heiner* v. *Donnan*, 285 U. S. 312, 338, 347-8 (1932) (dissenting opinion).

b. The statute here discriminates between the estates of decedents who have exercised non-beneficial powers of appointment and those who have not.

The amount of property which the appellants concede to have been properly included in the decedent's gross estate, was $4,835,335.10 (R. 15). The amount of permissible deductions was $766,319.32, leaving a net taxable estate of $4,069,015.78 if the appointed property be excluded from the gross estate. The tax payable in respect of a net estate of that amount would be $360,207.55, the highest applicable tax bracket being the 13% bracket.

Because the appointed property was included in the gross estate (except for the $650,000 mentioned above at p. 3) the gross estate has been computed at $10,120,907.17. The amount of permissible deductions being $766,319.32, the net taxable estate has been held to be $9,354,587.85 (R. 8). A tax of $1,212,509.69 has been assessed and paid, the highest applicable tax bracket being the 19% bracket (R. 8).

Thus, an estate precisely like that of the decedent, so far as any property in which the decedent had ever had any beneficial interest is concerned, would be required to pay only $360,000 in estate tax, whereas the decedent's estate has been required to pay $1,212,000, a difference of $852,000.

The Court of Appeals in this case assumes (R. 98), without deciding, that there would be applicable here a provision of the Decedent Estate Law of the State of New York (Cons. Laws, c. 13, § 124) to the effect that the estate tax shall be prorated among the persons to whom the property in the estate is transferred, in the proportions that the value of the property received by each such person bears to the total value of the property received by all persons interested in the estate. If this assumption is correct, about $685,000 of the total estate tax exacted from the decedent's estate, *i.e.*, the proportion corresponding in ratio to the value of the appointed property, would ultimately be borne by the recipients of the appointed property.

Even on this assumption, however, those who succeed to the decedent's own property (who are represented in this case by the appellant executors) will have been required to pay a tax of about $165,000 more than would have been payable if the appointed property had not been included in the decedent's gross estate. Such is the effect of the aggregation of the appointed property with the decedent's own property and the consequent application of higher rates in the progressive rate scale, to which reference has already been made (pp. 30-1).

In other words, the State Courts have held that because the decedent has carried out a trust from which

no benefit could have been obtained for herself, her creditors or her estate, the persons who succeed to the decedent's property must pay some $165,000 more than other persons in precisely the same situation, save only that, in the one case, such a fiduciary function has been performed by the decedent, and in the other case it has not. Indeed, another decedent might even have exercised a power precisely similar except that it was exercisable either by will or by *inter vivos* deed, and if the exercise was by *inter vivos* deed, no tax would have been imposed in respect of the appointed property, either under the statute here in question or under any other statute of the State of New York.

c. There is no reasonable basis of classification which justifies the difference in treatment.

The various considerations to which attention has been directed by the appellants in connection with the due process question bear also, and with even greater force, upon the question whether the legislative classification satisfies the more exacting requirement of fairness imposed by the equal protection clause. Just as there is no conceivable factual premise upon which to justify the imposition of an estate tax in a situation such as the present one, so there is no conceivable reason why the Legislature should impose such a tax here while imposing no such tax in the similar case of a decedent owning the same amount of property who does not have the right to exercise a non-beneficial power of appointment, or refrains from exercising it, or has the right to exercise it by *inter vivos* deed and does so.

The usual statement of the requirement of the equal protection clause, as applied to State taxing statutes,

is that classification for the purposes of a State taxing statute must be reasonable, not arbitrary or capricious, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. See, for example, *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415 (1920); *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 37 (1928).

A State Legislature has broad discretion as to classification for purposes of taxation and is not required "to adopt an iron rule of equal taxation" (*Madden, Jr.* v. *Kentucky*, U. S. Sup. Ct., Oct. Term 1939, No. 92, decided Jan. 29, 1940). It is clear, however, that the power is not unlimited, and that where, as here, it is shown that the statute is oppressive and discriminatory and rests upon an arbitrary and erroneous assumption of fact, it will not be permitted to stand. *Air-Way Electric Appliance Corporation* v. *Day*, 266 U. S. 71 (1924); *Smith* v. *Cahoon*, 283 U. S. 553 (1931); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239 (1931). In the present case, where it plainly appears from the circumstances under which the statute was enacted, as outlined in the introductory portion of this brief (pp. 9-11 above), that the classification was not occasioned by local conditions known to the Legislature, there is no room for the operation of any presumption based upon the Legislature's greater knowledge of local conditions.

The Court will not indulge pure conjecture in order to hypothesize a state of facts which might justify the discrimination. Thus, in *Gulf, Colorado and Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150 (1897), the Court said (p. 154):

> "While good faith and a knowledge of existing conditions on the part of a legislature is to

> be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining state action."

Similarly, in *Binney v. Long*, 299 U. S. 280 (1936), discussed at length under Point III below, the Court said (p. 294):

> "While this court always accords great weight to the judgment of a state legislature, we cannot agree that there is here a fair basis for difference of treatment. All that is said in defense of the statute is that it treats alike all those who take under instruments executed prior to an arbitrary past date, and treats alike all those who take under instruments made subsequently to the same arbitrary date, and that the legislature may have found some reason for the discrimination in the state's policy of taxation. But this is merely to say that arbitrary classification which is the result of the exercise of the legislative will must be sustained."

In the present case, the only suggestion as to a possible reason of policy justifying the discrimination of which complaint is here made, is that the 1932 amendment of the estate tax law was required to prevent the escape of the property here involved from all death taxation through the inadvertent repeal, by the new estate tax law, of the old legacy tax which would have been payable upon the exercise, after the effective date of the new estate tax law, of powers theretofore created. See memorandum of Tax Department counsel

set forth above (pp. 10-11) and opinion of Court of Appeals (R. 94-5). But, as we have already pointed out (pp. 7-9 above), if this were the motive for the 1932 amendment, it would be expected that the Legislature would have followed the course taken by it on two previous occasions in meeting similar situations, *viz.*, to provide that, upon the exercise of the power after the enactment of the new law, the property subject to the power should be treated in the same way as if the power had not been exercised, or had been exercised by a non-resident, *i.e.*, the old legacy tax should be imposed in respect of the property in the estate of the grantor of the power.

In any event, the most that this suggested possible reason of policy would have justified was the restoration of the tax which had been inadvertently repealed; it could not possibly be regarded as justifying the imposition of a new and different tax based upon an erroneous and arbitrary factual assumption and producing the oppressive and discriminatory effect which has been set forth.

It will not do to urge that it was easier to impose the new estate tax than to restore the old legacy tax. Even if there were any factual basis for such a claim, it is clear that such an attempted justification would not meet with the approval of this Court. Thus, in *Stewart Dry Goods Co.* v. *Lewis*, 294 U. S. 550 (1935), the Court, through Mr. Justice Roberts, said (pp. 559-60):

> "We are told that the gross sales tax in question is in truth a rough and ready method of taxing gains under the guise of taxing sales; that it is less complicated and more convenient of administration than an income tax; and Ken-

> tucky for these reasons is at liberty to choose this form, and to ignore the consequent inequalities of burden in the interest of ease of administration. *The argument is in essence that it is difficult to be just, and easy to be arbitrary. If the Commonwealth desires to tax incomes it must take the trouble equitably to distribute the burden of the impost.* Gross inequalities may not be ignored for the sake of ease of collection." (Italics supplied.)

It must certainly be true that even in an effort to close a loophole in a tax statute, a State may not completely ignore the equal protection requirement to which it is subject in all other fields of action, and that is precisely what has been done in the present case.

POINT III

THE APPLICABILITY OF THE STATUTE ONLY TO NON-GENERAL POWERS OF APPOINTMENT CREATED BEFORE SEPTEMBER 1, 1930, CONSTITUTES AN ADDITIONAL GROUND OF INVALIDITY UNDER THE EQUAL PROTECTION CLAUSE.

The statute prescribes a chronological classification of a kind which has been held by this Court to constitute a denial of the equal protection of the laws.

Subdivision 7-a of Section 249-r of Article 10-C of the New York Tax Law, which was added by the 1932 amendment involved in the present case, requires the inclusion in the decedent's taxable estate of property "passing under" a non-general power of appointment exercised by the decedent *only if*

> "the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power * * *."

Upon the enactment of Article 10-C, effective September 1, 1930, all appointive property became subject to a death tax (*i.e.*, the new estate tax) in the estate of the grantor of the power, since such property is as much a part of the grantor's estate for the purpose of the new tax as any of his other property. Consequently, it is clear that the applicability of subdivision 7-a depends on whether the power of appointment involved was created before September 1, 1930, in which case subdivision 7-a may apply, or after September 1, 1930, in which case subdivision 7-a can never apply.*

Thus, under the statute here in question, property subject to a non-general power is aggregated with the property of the *grantee* for the purpose of determining the tax if the power was created before September 1, 1930, whereas if the power was created after that date, such property is aggregated with the other property of the *grantor* of the power. This Court has squarely held that such a difference in treatment, based solely on the date when the power was created, constitutes an arbitrary and capricious classification which is violative of the equal protection clause. *Binney* v. *Long*, 299 U. S. 280 (1936).

In the *Binney* case, a Massachusetts death tax statute of the legacy tax type was involved. Effective September 1, 1907, Massachusetts had enacted a legacy tax statute which treated property subject to powers of appointment as being received by the beneficiary from the grantor of the power, not the grantee. Under this

* Between April 2, 1925 and September 1, 1930, Article 10-B of the New York Tax Law was operative, and under that Article appointive property was subject to a death tax in the estate of a resident grantor of a power, not in all cases, but whenever his net estate was of a certain minimum value, as prescribed in Article 10-B.

statute, if the grantor of the power had died before September 1, 1907, no legacy tax at all was payable in respect of the property subject to the power.

In 1909, Massachusetts enacted an amendment to the effect that property subject to a power of appointment should be taxed, on the exercise or non-exercise of the power, as if the property had been the property of, and had been received from, the grantee of the power. It was provided, however, that this amendment was to apply only to powers of appointment created (either by deed or by will) prior to September 1, 1907 (when the legacy tax statute first became effective); it was not to apply to powers created after that date.

In the case before the Court, the decedent had died intestate in 1931, and at her death was the grantee of two powers of appointment, one created in 1862 by an *inter vivos* deed of her father, and the other created in 1891 by the will of her mother. The property subject to each of these powers had been held taxable under the amended statute above described, and in accordance with another provision of the statute, such property had been aggregated with other property of the decedent going to the same beneficiaries in computing the rates of tax applicable under the progressive rate scale.

The Court held that, as so applied, the Massachusetts statute contravened the equal protection clause. The basis of the decision was that it was arbitrary and discriminatory for Massachusetts to make transfers by the exercise or non-exercise of a power of appointment taxable in the estate of the grantee of the power if the power was created prior to 1907, and not taxable in the estate of the grantee of the power if the power was created subsequent to 1907.

The Court took up separately the 1862 trust and the 1891 trust. In connection with its discussion of the former, the Court, through Mr. Justice Roberts, said (pp. 289-90):

> "The law, therefore, creates two classes,—the one composed of beneficiaries who take at the death of the donee of a power created by an instrument antedating 1907, who are taxed,—and the other of beneficiaries who take in succession to the donee of a power conferred by a deed executed subsequent to 1907, who are not taxed. Upon its face the statute arbitrarily selects a past date, taxing the beneficiaries of an act if done prior to, and leaving untaxed beneficiaries of a precisely similar act if done subsequent to that date. (p. 289)
>
> * * * * * *
>
> "Neither the appellee nor the Supreme Judicial Court advances any satisfactory reason for this difference in treatment of persons similarly circumstanced." (p. 290)

In connection with its discussion of the 1891 trust, the Court said (p. 293):

> "We think it an arbitrary and unreasonable discrimination that the beneficiary of a power must aggregate the interest so derived with that enjoyed by inheritance of property owned in fee by the donee of the power, if the instrument creating the power antedates 1907, but need not so aggregate the interests for the purpose of taxation if the creation of the power be subsequent to 1907. The consequence that the one must pay at a higher rate on the interest falling in at the death of the donee of the power than the other who takes by reason of an exactly sim-

ilar event, denies the equal protection of the law to the former."

In the present case, subdivision 7-a, enacted in 1932, can apply only to powers created prior to September 1, 1930, and can never apply to powers created after September 1, 1930; just as in the *Binney* case the statute in question, enacted in 1909, applied only to powers created prior to September 1, 1907, and not to powers created after September 1, 1907. The decision in the *Binney* case that the attempted classification in the Massachusetts statute was arbitrary and discriminatory, is equally applicable to the identical classification attempted in the New York statute here under consideration.

The fact that the date, September 1, 1907, was specifically mentioned in the Massachusetts statute involved in the *Binney* case, while the date, September 1, 1930, is not specifically mentioned in subdivision 7-a, surely cannot make any possible difference on the question whether the classification is arbitrary. It is just as clear that subdivision 7-a does not apply to powers created after September 1, 1930, as if the date had been specifically mentioned; and the equal protection clause deals with substance rather than form.

The Court of Appeals suggests in its opinion (R. 99-100) that in the *Binney* case, the discrimination was improper because it was based on a date arbitrarily selected, whereas in the present case, the discrimination is not arbitrary because it is based upon a date selected in order to prevent transfers "thereafter effected under powers theretofore granted from escaping all taxation". But it is clear that in the case of the Massachusetts statute involved in the *Binney* case, the

reason for the exemption of powers created after September 1, 1907 was that, from that date on, there was a death tax statute in force reaching the property subject to the power in the estate of the grantor of the power, just as in the present case there was, from September 1, 1930 on, such a death tax statute in force. Indeed, the justification for the selection of the date which is suggested by the Court of Appeals here was urged by the appellee Commissioner in the *Binney* case (see brief for appellee, No. 77, October Term, 1936, at pp. 32-3).

The one point of difference between the two cases, namely, that the present case involves an estate tax rather than a legacy tax, merely serves to aggravate the discrimination in the present case. Under the Massachusetts statute, the aggregation of the appointive property with other property for the purpose of the graduated rate provisions, to which the Court in its opinion in the *Binney* case adverted, was only an aggregation with other property going to *the same beneficiary*. In the present case, the effect of applying subdivision 7-a has been to aggregate the appointive property with all of the other property comprising the decedent's taxable estate, not only the property going to the same beneficiaries, but also all of the property going to entirely different beneficiaries. Thus, the injustice and inequalities produced by the aggregation in the present case are even more striking than in the *Binney* case.

CONCLUSION

The best that can be said of the 1932 amendment is that it is an inadvertent excrescence on an otherwise rational system of death taxation. It can be invali-

dated without in any way affecting the remainder of the statute. It cannot even be supposed that any substantial loss of revenue to the State would result from its elimination. For it could hardly be expected that if the present tax is sustained, any grantee of a special power of appointment created before 1930 would hereafter exercise such power and thereby cast upon those who succeed to his own estate an additional tax burden unrelated to any benefit or privilege enjoyed by either the grantee or his heirs.

The inevitable result of permitting the statute to stand will be the frustration, in an indeterminate number of cases, of the wholly laudable purpose of some decedent who died before 1930 to have some survivor determine how his property should best be apportioned among the objects of his bounty in the light of circumstances subsequent to his death.

Nor is it necessary to assume that the invalidation of the 1932 amendment will result in permitting property subject to powers created before 1930 to escape all death taxation upon the subsequent exercise of the powers. It may properly be assumed that when the arbitrary and discriminatory nature and effect of the 1932 amendment are brought home to the Legislature by a decision of this Court invalidating the statute, the Legislature will promptly take the rational course of restoring in respect of such property the legacy tax inadvertently repealed upon the enactment of Article 10-C in 1930.

THE STATUTE HERE INVOLVED AS APPLIED IN THE PRESENT CASE DEPRIVES THE APPELLANTS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW AND DENIES TO THEM THE EQUAL PROTECTION OF THE LAWS, AND ACCORDINGLY THE JUDGMENT OF THE STATE COURT SHOULD BE REVERSED.

Respectfully submitted,

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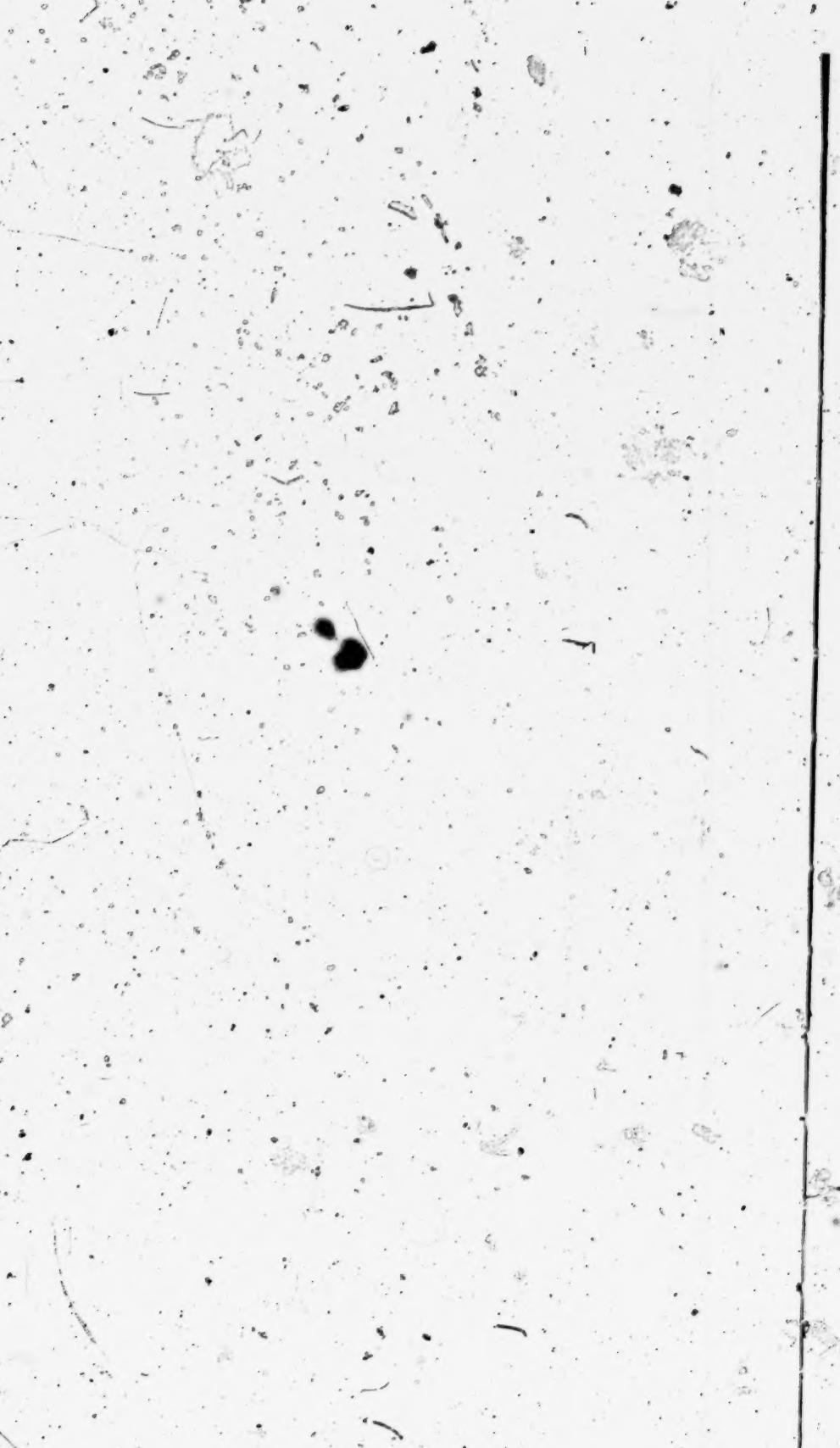

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 541

GERTRUDE VANDERBILT WHITNEY AND CORNELIUS VANDERBILT, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ALICE G. VANDERBILT, DECEASED, AND SAID CORNELIUS VANDERBILT, INDIVIDUALLY; GLADYS SZECHENYI, CATHLEEN VANDERBILT LOWMAN, GLORIA LAURA MORGAN VANDERBILT, INFANT, AND THOMAS B. GILCHRIST, AS GENERAL GUARDIAN OF THE PROPERTY OF SAID INFANT,

Appellants,

against

STATE TAX COMMISSION OF THE STATE OF NEW YORK.

APPEAL FROM THE SURROGATE'S COURT OF THE STATE OF NEW YORK.

MOTION TO DISMISS OR AFFIRM.

MORTIMER M. KASSELL,
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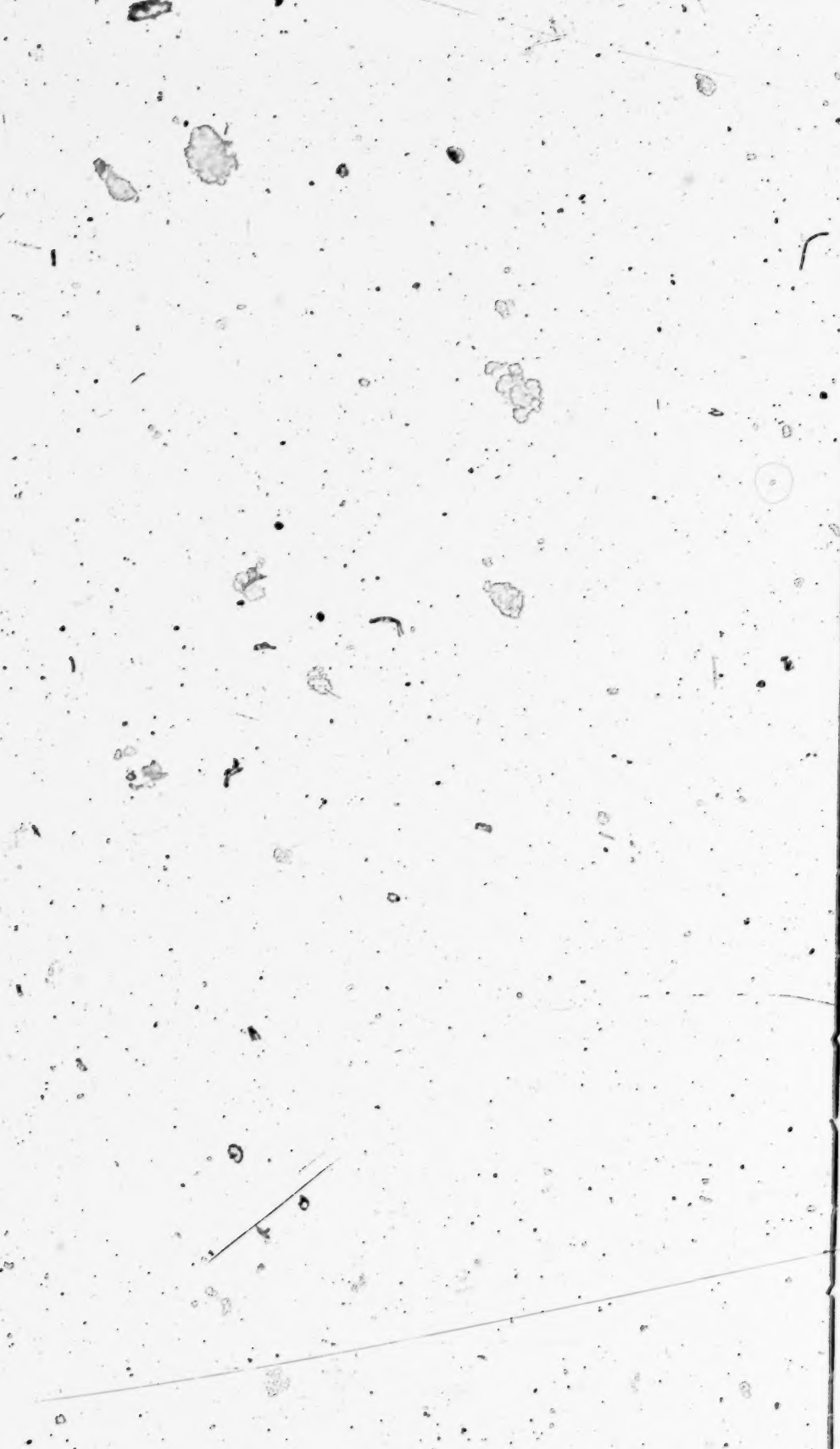

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GERTRUDE VANDERBILT WHITNEY AND CORNELIUS VANDERBILT, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF ALICE G. VANDERBILT, DECEASED, AND SAID CORNELIUS VANDERBILT, INDIVIDUALLY; GLADYS SZECHENYI, CATHLEEN VANDERBILT LOWMAN, GLORIA LAURA MORGAN VANDERBILT, INFANT, AND THOMAS B. GILCHRIST, AS GENERAL GUARDIAN OF THE PROPERTY OF SAID INFANT,

Appellants,

against

STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellee.

APPEAL FROM THE SURROGATE'S COURT OF THE STATE OF NEW YORK.

MOTION TO DISMISS OR AFFIRM.

MAY IT PLEASE THE COURT:

Now comes the appellee in the above entitled cause, by their counsel of record, and moves that the appeal herein

be dismissed, or that the order and decree appealed from be affirmed.

This motion is made upon the ground that the questions upon which the decision of the cause depends are so insubstantial as not to need further argument.

Appellants' first assertion in their jurisdictional statement is that the statute in question violates the due process of the Fourteenth Amendment of the Constitution of the United States. The decisions of this Court have long established that a death tax upon transfer of property by the exercise of a special power of appointment can validly be imposed in the estate of the donee of such power without violating the Fourteenth Amendment.

Orr v. *Gilman* (1902), 183 U. S. 278, affirming *Matter of Dows*, 167 N. Y. 227;

Chanler v. *Kelsey* (1907), 205 U. S. 466, affirming *Matter of Delano*, 176 N. Y. 486.

The principle of the above cited cases is equally applicable to an estate tax such as is imposed by the State of New York. To sustain the validity of such a tax it is not necessary that the decedent own the property or be able to derive some economic benefit therefrom. Validity depends upon whether the death of the decedent effects a shifting of economic benefits.

Chase National Bank v. *United States* (1929), 278 U. S. 327;

Tyler v. *United States* (1930), 281 U. S. 497;

Gwinn v. *Commissioner* (1932), 287 U. S. 224;

Porter v. *Commissioner* (1933), 288 U. S. 436;

Commissioner v. *Chase National Bank* (1936), 82 F. (2d) 157 (C. C. A. 2d), cert. denied 299 U. S. 552;

United States v. *Jacobs* (1939), 306 U. S. 363.

The exercise of a power of appointment clearly effects a transmission of economic benefits. (*Orr* v. *Gilman, supra*; *Chanler* v. *Kelsey, supra.*)

Appellants' claim in their jurisdictional statement designated as the "first equal protection question" merits no further consideration than that accorded by this Court in *Chase National Bank* v. *United States, supra*, 278 U. S. 327, where it was said (pages 338-9):

> "The objection urged by plaintiff under the second question, that the statutory method of fixing the tax and securing its payment infringes the 5th Amendment, need not detain us. It is said that both the tax on those who share in the decedent's estate and that paid by the beneficiaries is larger than it otherwise would be if the proceeds of the insurance had not been included in the decedent's gross estate. But the increase in the tax to both is a consequence of including the amount of the policies in the gross estate in determining the net which is made the measure of the graduated transfer tax. The objection amounts to no more than saying that if the transfer of the policies or their proceeds be taxed, they should not be included with the other property of the estate in determining the rate of the tax. As it is the termination of the power of disposition of the policies by decedent at death which operates as an effective transfer and is subjected to the tax, there can be no objection to measuring the tax or fixing its rate by including in the gross estate the value of the policies at the time of death, together with all the other interests of decedent transferred at his death. Stebbins *v.* Riley, 268 U. S. 137. The inclusion in the gross estate of gifts made in contemplation of death under § 402 (c) has a like effect."

The contention that the Fourteenth Amendment embraces a wider area of prohibition than the Fifth on the question under consideration was negatived by this Court in *Stebbins* v. *Riley* (1925), 268 U. S. 137.

Appellants' "second equal protection question" designated in their jurisdictional statement is also insubstantial.

The statute served to remove discrimination, not to create it. This is apparent from the history of the taxation of powers of appointment in New York. Under Article 10 of the Tax Law, which imposed a transfer tax as to decedents who died prior to September 1, 1930, general and special powers of appointment were taxed upon their exercise, not upon their creation (Section 220). In 1930, the New York Legislature enacted Article 10-C of the Tax Law and thereby substituted for the former transfer tax, an estate tax modeled on the Federal estate tax. Under said Article 10-C (applicable to decedents dying after September 1, 1930) general powers are taxed upon their creation and upon their exercise, while special powers are taxed upon their creation but not upon their exercise (Section 249-r, subdivisions 1 and 7). It was thus apparent that while special powers created and exercised before September 1, 1930, were taxed upon their exercise and such powers created and exercised after said date were taxed upon their creation, such powers created prior thereto, but exercised thereafter, were not subject to any tax whatsoever. To remove this inequality, the New York Legislature in 1932 enacted subdivision 7-a of section 249-r of the Tax Law. Said subdivision provides for the inclusion in decedents' gross estates of property passing under the exercise of limited powers of appointment where the transfer of the property had not been subjected to taxation at the time the powers were created.

The test provided for in the statute is whether the transfer of the property had theretofore been subjected to taxation. This Court has repeatedly sustained the validity of such a classification.

Watson v. State Comptroller (1920), 254 U. S. 122, affirming *Matter of Watson*, 226 N. Y. 384;

Stebbins v. *Riley, supra* (1925), 268 U. S. 137;
Klein v. *Board of Tax Supervisors* (1930), 282 U. S. 19;
Welch v. *Henry* (1938), 305 U. S. 134.

Binney v. *Long* (1936), 299 U. S. 280, is inapplicable. In that case the Massachusetts Legislature imposed a different tax on successions under powers created before a certain date than on powers created subsequent thereto. The clear distinction, as pointed out by the Court of Appeals, is that in the case at bar the powers taxed under subdivision 7-a are those which otherwise would escape all taxation and which by the law in effect at the time of their creation, were expressly made subject to tax in the donees' estates upon their exercise.

Appellee respectfully requests that the appeal therein be dismissed for want of a substantial Federal question.

Dated, October 30, 1939.

MORTIMER M. KASSELL,
Counsel for Appellee.

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 541.

GERTRUDE VANDERBILT WHITNEY and CORNELIUS VANDERBILT, as Executors of the Last Will and Testament of ALICE G. VANDERBILT, Deceased, *et al.*,

Appellants,

vs.

STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellee.

BRIEF FOR APPELLEE.

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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 541.

GERTRUDE VANDERBILT WHITNEY and CORNELIUS VANDERBILT, as Executors of the Last Will and Testament of ALICE G. VANDERBILT, deceased, and said CORNELIUS VANDERBILT, individually, GLADYS SZECHENYI, CATHLEEN VANDERBILT LOWMAN, GLORIA LAURA, MORGAN VANDERBILT, infant, and THOMAS B. GILCHRIST, as General Guardian of the property of said infant,

Appellants,

vs.

STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellee.

BRIEF FOR APPELLEE

OPINIONS OF THE STATE COURTS

The opinion of the Surrogate (R. 66) is reported in 163 Misc. 667. No opinion was rendered by the Ap-

pellate Division of the Supreme Court in affirming the order of the Surrogate. The opinion of the New York Court of Appeals (R. 86) is reported in 281 N. Y. 297.

JURISDICTION

The judgment of the Court of Appeals was rendered July 11, 1939 (R. 84). The appeal to this Court was taken October 10, 1939, and probable jurisdiction was noted by this Court in an order dated December 11, 1939. The jurisdiction of this Court is claimed under section 237 (a) of the Judicial Code, as amended by the Acts of February 13, 1925, January 31, 1928 and April 26, 1928.

STATEMENT

Cornelius Vanderbilt, donor of the power of appointment exercised by Alice Vanderbilt, the decedent herein, died a resident of the State of New York on July 12, 1899 (R. 22). By his will he provided that a trust fund should be set up by his executors to pay his wife the sum of $250,000. annually. It was also provided that, at the death of his wife, the principal of the trust should be paid to four of their children in such amounts as she should appoint by her will. In default of appointment, the trust fund was to be paid to such children share and share alike, the issue of any deceased child to take their parent's share (R. 40).

Alice Vanderbilt died a resident of New York State on April 22, 1934 (R. 9). By her will she appointed the principal of the said trust among the survivors of the aforesaid children and the issue of two of said child-

dren who had predeceased her (R. 30). It was decedent's appointment, not merely the extinction of her life estate, as appellants assert, which gave the appointed property to her children.

The value of the trust fund at decedent's death was $5,935,572.07 (R. 24). Said amount, less the value of the property taken by remaindermen who took a smaller amount under the exercise of the power than they would have taken in default of the power (see *Matter of Duryea* (1938), 277 N. Y. 310), or $5,285,572.07, has been included in decedent's estate for the purposes of the estate tax imposed under Article 10-C (sections 249-m to 249-mm) of the Tax Law of the State of New York (R. 7).

The inclusion of the above amount in decedent's estate has been upheld without judicial dissent by the Surrogates' Court of New York County, the Appellate Division of the Supreme Court, and the Court of Appeals of the State of New York.

THE STATUTES INVOLVED

The first death tax in New York was enacted by Chapter 481 of the Laws of 1885. By said chapter a tax was imposed on testamentary transfers, including the transfer of property subject to a power of appointment, whether general or limited (*Matter of Stewart* (1892), 131 N. Y. 274). Under this law the exercise of a power of appointment was not subject to tax (*Matter of Harbeck* (1900), 161 N. Y. 211). Chapter 284 of the Laws of 1897, amending section 220 of the Tax Law, provided that the exercise of a power of ap-

pointment should be taxed as if the appointive property were owned by the donee of the power. This statute exempted property passing under the exercise from a tax in the estate of the donor. It was in effect at the time of the death of Cornelius Vanderbilt, and provided as follows:

> "Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after the passage of this act, such appointment when made shall be deemed a transfer taxable under the provisions of this act in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will; and whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of this act shall be deemed to take place to the extent of such omissions or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

The above statute was construed to apply to limited as well as general powers (*Matter of Dows* (1901), 167 N. Y. 227, affirmed *sub. nom. Orr v. Gilman* (1902) 183 U. S. 278; *Matter of Delano* (1903) 176 N. Y. 486, affirmed *sub. nom. Chanler v. Kelsey* (1907), 205 U. S. 466).

Subsequently, it was held that chapter 284 was unconstitutional in so far as it attempted to impose a tax on the nonexercise of a power (*Matter of Lansing* (1905), 182 N. Y. 238), and accordingly, the provision for taxing the nonexercise of powers was eliminated (Chapter 732, Laws of 1911). This left the transfer of property under a power of appointment which was not exercised taxable in the estate of the donor.

By Chapter 320 of the Laws of 1925, the Legislature enacted Article 10-B of the Tax Law, imposing a supplemental tax designed to take up the credit for State taxes allowed by the Federal Estate Tax Law. Under Article 10-B, (Sections 249 to 249 l), an estate tax was imposed in estates of a certain minimum, and there was included in determining the taxable estate, the amount of all property of a decedent, including property transferred subject to a power of appointment.

It having been held that the exercise of a power of appointment created by a resident decedent was not subject to tax where the donee died a nonresident, (*Matter of Fearing*, (1911), 200 N. Y. 340), Chapter 357 of the Laws of 1926 amended section 220 of the Tax Law to provide that such transfers should be taxed in the estate of the donor.

In 1930, the estate tax presently imposed under Article 10-C of the Tax Law was substituted for the earlier taxing articles in respect of decedents dying thereafter (Chapter 710, Laws of 1930). Under Article 10-C, property transferred subject to a power of appointment, whether general or limited, is included in the donor's gross estate (section 249-r (1), Tax Law), and

property passing under the exercise of a *general* power of appointment is included in the donee's gross estate (section 249-r (7), Tax Law). However, as originally enacted, Article 10-C made no provision for including in a donee's estate property passing under the exercise of a *limited* power. In this state of the law, property passing under the exercise of a limited power created when the law provided that the tax should be imposed in the estate of the donee upon the exercise, was not taxable in either the donor's or the donee's estate. To close this gap, the Legislature added subdivision 7-a to section 249-r of the Tax Law (Chapter 320, Laws of 1932, effective March 21, 1932). It is this statute, the validity of which is here attacked.

Subdivision 7-a provides as follows:

"§ 249-r. Gross estate. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, * * *.

"7-a. To the extent of any property passing under a power of appointment exercised by the decedent (a) by will, or (b) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a *bona fide* sale for an adequate and full consideration in money or money's worth, exclusive of property the value of which is required to be included in the gross estate pursuant to paragraph numbered seven of this section, and provided that the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power but would have been so taxable except for a statute providing that the tax

on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof."

The purpose of the amendment is clear from the explanatory memorandum submitted by the State Tax Commission (R. 53). Appellants would make it appear that the Legislature enacted subdivision 7-a without being aware of its full meaning. They suggest that the statute was passed perfunctorily and that the memorandum was submitted only to the Governor. This is not the fact, for following a long-established practice, the memorandum was submitted to the respective tax committees in the two Houses of the Legislature, as well as to the majority and minority leaders of both Houses.

Appellants distinguish between the tax imposed under Article 10C and the tax imposed prior to 1930 under Article 10 (sections 220 to 245) of the Tax Law. The distinction is correct, in so far as it concerns the method of computing the tax on the basis of the amount received by an individual under Article 10 and on the basis of the amount of the entire estate transferred under Article 10-C. However, appellants err in describing the Article 10 tax as a tax on the right to *receive* property. The tax was on the right to *transfer* property. The taxing article is denominated "Taxable Transfers." See also *Keith v. Johnson* (1926), 271 U. S. 1; *People ex rel. Home Trust Company v. Law* (1923), 204 App. Div. 590, aff'd 236 N. Y. 607; *Matter of Keeney* (1909), 194 N. Y. 281, 284, aff'd *sub nomine Keeney v. New York* (1912), 222 U. S. 525; *Matter of Merriam* (1894), 141 N. Y. 479, aff'd *sub nomine United*

States v. Perkins (1896), 163 U. S. 625; Handy, *Inheritance And Other Like Taxes*, p. 42.

Appellants seem to place reliance on the fact that no Federal estate tax is imposed with respect to the exercise of limited powers of appointment. This, of course, does not prove any lack of congressional power to impose such a tax. Moreover, it should be observed that Congress has not been confronted with the same situation as arose in New York by reason of the transition from the transfer tax to the estate tax.

SUMMARY OF ARGUMENT

1. Subdivision 7-a does not violate the due process clause of the Fourteenth Amendment to the United States Constitution, as there is a shifting of the economic benefits in property occasioned by the donee's exercise of a limited power of appointment and as the only appointments under a limited power made subject to the New York estate tax are those where at the time of the creation of the power the law provided that the appointive property should be deemed to be owned by the donee.

A beneficial interest of a decedent in property is not necessary for treating such property as part of the decedent's taxable estate for the purposes of an estate tax, as control over the property by the decedent is sufficient.

2. The statute does not violate the equal protection of the laws clause as the classification is a reasonable exercise of the legislative taxing power.

There is no arbitrary discrimination between estates in which a limited power of appointment is exercised and estates in which there is no such power, as in the one case the decedent's death operates as the generating source of the shifting of the economic benefits in more property than in the other.

There is no chronological classification as the test is not the time the power was created, but whether the power had theretofore been taxed.

POINT I.

The statute is not unconstitutional as a deprivation of property without due process of law.

(a) As there was a shifting of the economic benefits in the appointive property at decedent's death, the statute is valid.

The transfer of property from the dead to the living is a privilege accorded by the state. The state therefore has broad discretion in taxing such transfers. The estate tax imposed by the State of New York is modeled after the estate tax imposed by the United States Revenue Act of 1926 (*Matter of Cregan* (1937), 275 N. Y. 337). It is a tax on the shifting of the economic benefits in property at and by the death of a decedent (*Chase National Bank v. United States* (1929) 278 U. S. 317).

To justify the inclusion of property in the measure of an estate tax, it is necesary only that the death of the decedent be the generating source of the trans-

mission of the economic benefits therein. Thus, this Court has held it proper to include in a decedent's gross estate the proceeds of life insurance (*Chase National Bank v. United States, supra*, (1929) 278 U. S. 317); the full value of property in which the decedent was a joint tenant (*United States v. Jacobs* (1939), 306 U. S. 363); the full value of property in which the decedent was a tenant by the entirety (*Tyler v. United States* (1930), 281 U. S. 497); and the value of property in a trust subject to a limited power to alter, amend or revoke (*Porter v. Commissioner* (1933), 288 U. S. 436).

That there was a shifting in the economic benefits of the appointive property by the exercise of the power by decedent cannot be denied. The decedent might have given $5,935,572.07 to any one of her surviving children or the issue of a predeceased child, and nothing to the others. She could have divided $5,935,572.07 among such children or issue in any way she saw fit. Actually, the decedent gave Gladys Szechenyi $3,523,714.66, Kathleen V. Lowman and Gloria Laura Morgan Vanderbilt, $880,928.66 each, Gertrude V. Whitney $150,000, and William H., Alfred G., and George Vanderbilt, children of a deceased son, $166,666.66 each. Under such circumstances, it is clear that there was a shifting of the economic interests in the appointive property generated by decedent's death.

The constitutional propriety under the due process clause of subjecting to death taxation property passing under the exercise of a limited power of appointment was determined by this Court in *Orr v. Gilman* (1902), 183 U. S. 278, and *Chanler v. Kelsey* (1907), 205 U. S. 466. These cases recognized that "in reality and

substance it is the execution of the power that gives to the grantee the property passing under it." Plainly, the donee can alter legal relationships in the property, and the donee's act effects the ultimate disposition of the property. It is his act which completes the transfer of the property from the dead to the living.

Even if appellants' view be conceded that the *Orr* and *Chanler* cases are not controlling because a "legacy" tax on the right to receive property was there involved, nevertheless, if it is consistent with due process to deem that the appointees receive the appointed property from the donee for the purposes of such a tax it is no less consistent to deem that the donee gives the appointed property to the appointees for the proposes of an estate tax. If it is not fictional to ascribe "ownership" to a donee for the purposes of a legacy tax, it is not fictional to ascribe "control" to a donee for the purposes of an estate tax. 52 *Harvard Law Review* 929. (Cf. *Curry v. McCanless* (1939), 307 U. S. 357, 371).

Furthermore, the distinction appellants endeavor to make is unimportant in view of the fact that section 124 of the Decedent Estate Law of New York, provides for the equitable proration of the tax among the persons interested in the estate, including appointees under a power.

Appellants argue that in order that property be included in the measure of an estate tax, it is necessary that the decedent at least have the equivalent of ownership of such property. No justification for this position can be found in the cases. In *Heiner v.*

Donnan (1932), 285 U. S. 312; *Hoeper v. Tax Commission* (1931), 284 U. S. 206; *Schlesinger v. Wisconsin* (1926), 270 U. S. 230, and *Nichols v. Coolidge* (1927), 274 U. S. 531, relied on by appellants, the taxpayer had no control whatsoever over the property included in the measure of the tax. On the contrary, it has been seen that inclusion of property in a gross estate for purposes of an estate tax has been upheld, even though the interest of the decedent is considerably less than ownership of the whole property. (*Chase National Bank v. United States, Tyler v. United States, Porter v. Commissioner, United States v. Jacobs,* all *supra*). Moreover, even accepting appellants' proposition as true, it does not lead to the conclusion that the present tax is invalid for, as has been heretofore shown, the interest of the donee in property subject to a limited power is, for purposes of an estate tax, equivalent to ownership.

Appellants contend that the inclusion in decedent's estate of the appointed property is a denial of due process of law because decedent had no beneficial interest therein. The contention is not well founded. It is not necessary for the validity of an estate tax that the property included in the taxable estate be property in which the decedent has a beneficial interest. The precise question has been passed on by this Court in *Porter v. Commissioner, supra*, 288 U. S. 436. In that case, the decedent had set up a trust under which he retained the right to alter, amend, or revoke, *but not in favor of himself or his estate.* At his death, the value of the trust property was included in his gross estate under the Revenue Act of 1926. This Court rejected the contention that the statute was violative of due process because it imposed an estate tax in

respect of property in which the decedent had no beneficial interest. See also, to the same effect *Commissioner v. Chase National Bank* (1936), 82 Fed. (2d) 157 (C. C. A.—2), cent. denied, 299 U. S. 552; *Witherbee v. Commissioner* (1934), 70 Fed. (2d) 696 (C. C. A.—2), cert. denied 293 U. S. 582, rehearing denied, 293 U. S. 631; *Cook v. Commissioner* (1934), 66 Fed. (2d) 995, (C. C. A.—3), cert. denied, 291 U. S. 660.

Appellants claim that the tax in the *Porter* case was upheld because the property had been originally owned by the decedent, and that taxation was sustained as a reasonable measure to prevent avoidance. The fallacy in this attempted distinction is obvious. The trust in the *Porter* case was created prior to the Revenue Act of 1924, which first provided for a tax on property transferred subject to a power to alter, amend or revoke. Thus, it was that decedent had completely divested himself of beneficial ownership in the property prior to the enactment of the taxing statute, and the tax could not have been upheld as one to prevent avoidance. Compare *Reinecke v. Northern Trust Co.* (1929), 278 U. S. 339, and *Helvering v. City Bank Co.* (1935), 296 U. S. 85.

Indeed, in *Sanford v. Commissioner* (1939), 84 L. ed. 53, this Court has recently pointed out that it was not the *inter vivos* transfer that occasioned the tax in the *Porter* case, but rather the shifting of the economic benefits in the trust property at the death of the decedent. See also 47 *Harvard Law Review* 1209, 1241.

Appellants likewise misinterpret the decisions in *Reinecke v. Northern Trust Co.* (as to the trusts under

which decedent had unrestricted power of revocation), *Tyler v. United States,* and *United States v. Jacobs,* all *supra.* Those cases went on the ground that there was a shifting in the economic benefits in the property at the decedent's death. Of the cases referred to by appellants, in only *Helvering v. City Bank Co., supra,* 296 U. S. 85, and *United States v. Wells* (1931), 283 U. S. 102, was the tax upheld as a measure to prevent avoidance.

(b) As the law in effect at the time of the creation of the power here under consideration provided that the exercise of a power should be considered a taxable transfer in the same manner as though the appointive property belonged absolutely to the donee, there is no violation of due process in treating the appointed property as owned by decedent for the purposes of the New York estate tax.

The only property brought into a decedent's taxable estate by subdivision 7-a of section 249-r of the Tax Law is property passing under the exercise of a power which the law in effect at the time of the creation of the power (Chapter 284, Laws of 1897) provided should be considered as though owned absolutely by the donee for the purposes of taxation. When the power herein was created by Cornelius Vanderbilt and vested in decedent, both he and decedent were on notice of the law's command that upon the exercise of the power the property appointed would be taxed as if owned absolutely by decedent. Hence, there can be no complaint that there is a lack of due process in including the appointed property in decedent's taxable estate.

It is true that at the time of the creation of the power herein, the tax imposed in donees' estates upon the exercise of powers was a transfer tax, and that the tax now imposed in decedent's estate is an estate tax. However, the statute gave no assurance that the tax imposed would continue to be a transfer tax; it merely forewarned that the appointive property would be considered as owned by the donee of the power. In making use of a power of appointment the parties submitted to whatever tax should be imposed in the estate of the donee by virtue of the statutory assumption.

The situation here cannot be distinguished in principle from that in *Milliken v. United States* (1931), 283 U. S. 15, where a tax at death on a transfer in contemplation of death at higher rates than were in effect at the time of the transfer was upheld. See, also, *Klein v. United States* (1931), 283 U. S. 231; *Phillips v. Dime Trust & Safe Deposit Co.* (1931), 284 U. S. 160.

It should be observed also that there was no compulsion upon decedent to exercise the power, and that in the absence of an exercise, the property would not have been considered as owned by her. (See *Matter of Duryea* (1938), *supra*, 277 N. Y. 310).

POINT II.

The statute is not unconstitutional as a denial of the equal protection of the laws.

(a) The statute is a reasonable exercise of the legislative power.

The pertinent principles of law have been restated time and again by this Court. The power of a legislature to classify for purposes of taxation is very broad. Any classification is valid, provided it is not flagrantly discriminatory, arbitrary or unreasonable. Reasonableness is within the province of a legislature, and the courts refrain from substituting their judgment. If the intent and operation of a taxing statute is to distribute the tax burden with a fair degree of equality, the classification cannot be condemned. The presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

Madden v. Kentucky (1940), 84 L. ed. 406;
Illinois Central R. Co. v. Minnesota (1940), 84 L. ed. 377;
Welch v. Henry (1938), 305 U. S. 134;
Carmichael v. Southern Coal & Coke Company (1937), 301 U. S. 495;
Great Atlantic & Pacific Tea Co. v. Grosjean (1937), 301 U. S. 412;
Henneford v. Silas Mason Company (1937), 300 U. S. 577;
Salomon v. State Tax Commission (1929), 278 U. S. 484, affirming *Matter of Simonson*, 246 N. Y. 601;
Stebbins v. Riley (1925), 268 U. S. 137;
Watson v. State Comptroller (1920) 254 U. S. 122, affirming *Matter of Watson* (1919), 226 N. Y. 384;
Ohio Oil Co. v. Conway (1929), 279 U. S. 813;

Keeney v. New York (1912), 222 U. S. 525, affirming *Matter of Keeney*, 194 N. Y. 281;
Magoun v. Illinois Trust & Savings Bank (1898), 170 U. S. 283;
Bell's Gap R. Co. v. Pennsylvania (1890), 134 U. S. 232.

As has been heretofore noted, at the time of the enactment of Article 10-C of the Tax Law in 1930, there were pending numerous limited powers of appointment which had not been taxed in estates of donors, but which would have been there taxed except that the law (section 220 (5), Tax Law) provided that the transfer of property subject to a power of appointment should be taxed in the estate of the donee upon the exercise. When Article 10 C of the Tax Law superseded the earlier taxing articles as to decedents thereafter dying, it unwittingly failed to make provision for the taxation of such limited powers. When the omission was discovered, the Legislature believed that such powers should bear their just share of taxation. Other similar powers had been taxed either in the estate of the donor or in the estate of the donee. The legislature properly believed that powers, such as the one under consideration, should not escape all taxation. Hence it enacted subdivision 7-a.

It is submitted that in selecting the exercise of these particular powers for taxation the New York Legislature acted not only reasonably, but equitably. That the classification does not constitute a denial of the equal protection of the laws seems apparent. Surely it is competent for a legislature to tax the exercise of limited powers which were created at a time when the

law provided that the exercise should be subject to tax, even though the exercise of powers which were created at a time when the law had no such provision, are not taxed. Especially is this so when it is realized that all other limited powers are taxed at the time of creation in the estates of the donors.

It is beyond question that a legislature in the determination of its taxing policies may tax property transferred subject to the exercise of a limited power in either the estate of the donor of such power, or in the estate of the donee. Prior to 1930, the Legislature elected to impose the tax in the estate of the donee. Thereafter, it elected to impose the tax in the estate of the donor. It is said to be a violation of the equal protection clause to tax the exercise of limited powers of appointment created prior to 1930 in the estate of the donee, when in the case of similar powers created subsequent to 1930 the tax is in the estate of the donor. If this be true, it necessarily follows that once the legislature has elected to tax the exercise of such powers in the estates of the donees, it can never change that policy, unless it sees fit to forego the tax upon powers pending at the time the change is made. It would be strange, indeed, if the Constitution should be construed to prohibit a legislature from changing its taxing policy and to require the freezing into a taxing act of a particular policy once determined upon. It must be that a legislature has the power to decide as of a given time that property transferred subject to the exercise of a limited power of appointment shall not be taxable in the estate of the donor if the power be exercised, but shall be taxable in the estate of the donee, and that at some other time it has the power to decide that from such time forward the old method

of treating the taxation of such powers be changed and that the property subject to such powers be subjected to tax in the estates of the donors, without foregoing the tax on property passing under powers theretofore created.

In imposing a tax on powers which would otherwise have escaped taxation, the legislature acted not only reasonably, but, under well-established principles, validly.

In *Watson v. State Comptroller, supra* (1920), 254 U. S. 122, this Court upheld a statute which provided for an additional transfer tax upon certain investments transferred at death, upon which neither the general property tax nor an optional stamp tax had been paid, saying (p. 125):

> "And what classification could be more reasonable than to distinguish, in imposing an inheritance or transfer tax, between property which had during the decedent's life borne its fair share of the tax burden and that which had not?"

In *Welch v. Henry,* (1938) *supra,* 305 U. S. 134, the statute under consideration imposed an income tax upon dividends which had theretofore been exempted from taxation. This Court denied the contention that the statute was a denial of equal protection.

> See also, *Cahen v. Brewster* (1906), 203 U. S. 543; *Florida C. & P. R. Co. v. Reynolds* (1902), 183 U. S. 471.

Appellants claim that the imposition of a legacy tax would have been more reasonable than the imposition of an estate tax. Appellee submits that it was not

only reasonable that the Legislature should impose a tax on transfers which had not borne their share of taxation, but it was reasonable that the tax should be part of the estate tax system.

In enacting Article 10-C, one of the primary purposes of the Legislature was to do away with the dual system of taxation under Articles 10 and 10-B theretofore in effect. To have enacted a special method of taxation applicable only in the case of the exercise of limited powers theretofore created would have been inconsistent with this general purpose.

Furthermore, in enacting subdivision 7-a the Legislature desired to impose a tax on an aggregate of wealth passing from one generation to another. It was doubtlessly felt that property thereafter descending from parents to children by way of a special power of appointment, as in the case at bar, should be taxed by the same method of taxation regardless of when the power was created. In employing the estate tax method it achieved substantial uniformity with respect to the taxation of appointive property, for such property under powers created after 1930 are subject to an estate tax in the donor's estate, while such property under powers created before 1930, which had not theretofore been taxed, are subject to an estate tax in the donee's estate.

Again, it should be observed that the imposition of a legacy tax would not have achieved any greater equality than the imposition of an estate tax. Moreover, there were doubts as to whether a tax could have been imposed in the donor's estate because the law in

effect at the time of creation of the power provided that the tax be imposed in the donee's estate.

Appellants argue that the amendment made in 1911 (Chapter 732) eliminating the tax in the donee's estate on the nonexercise of a power and the amendment made in 1926 (Chapter 357) imposing the tax in the donor's estate where a nonresident donee exercised a power indicates a legislative policy to impose a tax in the donor's estate. Appellants are in error for in those cases the tax was imposed in the donor's estate because there was a lack of power to impose a tax in the donee's estate. The amendments were not indicative of any general legislative policy to impose a tax in the donor's estate where power so to do existed.

(b) There is no invalid discrimination between estates of decedents who exercise nonbeneficial powers of appointment and those who do not.

To say that there is no difference between an estate in which the decedent exercises a limited power of appointment and an estate of the same size in which there is no such power is to deny the obvious. In the one case the decedent has control over more property than in the other. There being a difference between the estates, the fact that there is a difference in tax does not make the statutes invalid. In all estate taxation the amount of tax increases progressively with the net amount of property over which the decedent has control. In all cases the tax on the amount that a beneficiary receives is increased progressively with the increase in the size of the estate of the decedent.

Appellants view the tax imposed from the wrong angle. They seek to make the tax on property taken

by a beneficiary correspond to the amount of property which each such beneficiary receives. But this is not the right approach for considering discrimination between *estates*. The question is what tax is imposed in respect of a decedent's entire estate. In such cases the amount of tax on the estate increases with the inclusion of much property over which the decedent does not have full power of disposition, as, for example, in estates in which there is included property in which the decedent is a tenant by the entirety, or a joint tenant, or in which he is the owner of life insurance. In the instant case the decedent had control over the appointive property, and that factor justifies treatment of the property in the same manner as if it were owned by the decedent. Hence, the tax is necessarily higher in decedent's estate than in an estate the same as decedent's, except for the power. See, *Knowlton v. Moore, supra* (1900), 178 U. S. 41; *New York Trust Co. v. Eisner* (1921), 256 U. S. 345.

Appellants' contention was considered by this Court in *Chase National Bank v. United States, supra* (1929), 278 U. S. 327, where Mr. Justice Stone said (pp. 338-9):

> "It is said that both the tax on those who share in the decedent's estate and that paid by the beneficiaries is larger than it otherwise would be if the proceeds of the insurance had not been included in the decedent's gross estate. But the increase in the tax to both is a consequence of including the amount of the policies in the gross estate in determining the net which is made the measure of the graduated transfer tax. The objection

amounts to no more than saying that if the transfer of the policies or their proceeds be taxed, they should not be included with the other property of the estate in determining the rate of the tax. As it is the termination of the power of disposition of the policies by decedent at death which operates as an effective transfer and is subjected to the tax, there can be no objection to measuring the tax or fixing its rate by including in the gross estate the value of the policies at the time of death, together with all the other interests of decedent transferred at his death. *Stebbins v. Riley*, 268 U. S. ."

While the *Chase* case involved the due process clause of the Fifth Amendment, the reasoning is equally applicable here.

(c) There is no invalid chronological classification.

Appellants next contend that subdivision 7-a is invalid because it sets up an arbitrary chronological classification, that is, it taxes the exercise of powers created prior to 1930, but not after 1930. This contention is predicated on an inaccuracy. Subdivision 7-a applies where "the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power *but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof.*" Appellants omit the underscored portion of the

above statute in quoting it under Point III of their brief.

It has been seen that the test of taxation under subdivision 7-a is not the time of the creation of the power, but a fact pertinent to the creation, that is, whether the power was created when the law provided that for the purposes of taxation the property should be considered as owned by the donee. The fact is the test of taxation: The time merely incidental to the fact. This is not chronological classification.

That no chronological classification is made by subdivision 7-a is further seen when it is re-called, as heretofore noted, that between 1925 and 1930 there was imposed by Article 10-B of the Tax Law a tax in respect of all property, including property passing subject to the exercise of a power, in estates above a certain minimum. Thus, there were some estates during this period in which the creation of limited powers was subject to tax and others in which no tax was imposed in respect of property transferred subject to a limited power. In the one case, no tax is imposed on the exercise by a donee now dying, and in the other case, a tax is prescribed by subdivision 7-a.

The situation is not dissimilar to that where a deduction for previously taxed property is allowed from the gross estate for purposes of the Federal estate tax (section 812, Internal Revenue Code), and the New York estate tax (section 249-s, Tax Law). The operative fact in both cases is whether the property has theretofore borne its just share of taxation. See also, *Watson v. State Comptroller*, *supra*, 254 U. S. 122.

Binney v. Long, (1936), 299 U. S. 280, upon which appellants rely to sustain their claim of invalidity because of a denial of the equal protection of the laws involved a situation different from that involved in the case at bar. The powers reached by the invalid Massachusetts statute were created at a time when there was no provision for their taxation. Whereas, in the present case, the powers taxed are only those which, when they were created, were expressly made subject to tax in the estates of the donees. Hence, *Binney v. Long* is not in point here.

Further observation on the *Binney* case might not be deemed amiss. Under the Massachusetts statute, if two powers created *inter vivos* were exercised the same day, the one created prior to 1907 would not be taxed, but the one created after 1907 would be. There was no justification on the bare facts for this discriminatory treatment by Massachusetts. In so far as the decision related to the 1891 trust, apparently it was founded on the view that discrimination existed because powers created testamentarily before 1907 were taxd in a more burdensome manner, by the aggregation method, than similar powers created after 1907.

In any event, whatever may be presently thought of the decision in *Binney v. Long*, it is submitted that it is not in point here.

Conclusion.

It is respectfully submitted that the judgment of the Surrogate's Court of New York County should be affirmed.

Respectfully submitted,

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HARRY T. O'BRIEN, JR.,
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Dated, February 23, 1940.

pp. 1, 3, 5, 7

SUPREME COURT OF THE UNITED STATES.

No. 541.—October Term, 1939.

Gertrude Vanderbilt Whitney and Cornelius Vanderbilt, as Executors of the Last Will and Testament of Alice G. Vanderbilt, Deceased, et al., Appellants, *vs.* State Tax Commission of the State of New York.	Appeal from the Surrogate's Court of New York.

[March 25, 1940.]

Mr. Justice Frankfurter delivered the opinion of the Court.

Cornelius Vanderbilt died in 1899. By his will he established a trust to issue a designated annual income to his wife. Upon her death, Mrs. Vanderbilt was also given the power to dispose of this fund among ~~their~~ four children, in such proportions as she might choose. In default of her exercise of this discretionary power, the fund was to go to the children equally. Mrs. Vanderbilt died in 1934, and by her will availed herself of the power. The taxing authorities of New York included the value of this trust fund in her gross estate, and on this basis computed Mrs. Vanderbilt's estate tax. The Court of Appeals of New York, finding that the applicable New York legislation had been properly construed by the Tax Commission, sustained its validity. 281 N. Y. 297. The result of this decision is to reduce the amount available for distribution among the beneficiaries of Mrs. Vanderbilt's independent property below what it would have been had the tax been assessed on the basis of that property without the inclusion of the trust fund which came from her husband. These beneficiaries, and the executors of the will, claim that the exaction thus sanctioned by New York violates the Fourteenth Amendment of the United States Constitution.

of their

The contested statute, New York Laws of 1932, ch. 320, derives meaning as an incident in the history of New York's present system of death taxes. That system had its beginning in 1885. The original act taxed individual economic benefits derived upon death rather than the total amount of the estate. Laws of 1885, ch. 483. Under this legislation, the transmission of property subject to powers of appointment, either general or special, was attributed to the estate of the donor. *Matter of Stewart*, 131 N. Y. 274; and the subsequent exercise of the power was not taxed. *Matter of Harbeck*, 161 N. Y. 211. The administrative awkwardness incident to this treatment of appointive property led to an amendment whereby all property passing under powers of appointment was attributed to the donee, not to the donor. Laws of 1897, ch. 284. This was the New York law when Cornelius Vanderbilt died. In 1930, experience with the legacy tax in New York and elsewhere led to a shift in the basis for imposing death duties. Acting upon the results of an inquiry into the defects and inadequacies of a taxing system born of other times and calculated to meet different needs, New York in 1930 supplanted her system which taxed the individual legatee's privilege of succession by one which measured the levy by the size of the total estate. Laws of 1930, ch. 710. Under this legislation, property subject to a power of appointment—whether general or special—is included in the donor's gross estate. If the power is general, its later exercise sweeps the appointive property into the donee's gross estate also.

As is apt to happen in extensive legislative readjustments dealing with complex problems, the effect of the change in 1930 upon some of the more specialized situations coming within the general policy was overlooked. Powers created between 1885 and 1897 had been taxable at the donor's death. Special powers created after 1897 and exercised before 1930 had been taxed at the donee's death. Powers created and exercised after 1930 were included in the donor's estate. But powers created after 1897 and not exercised before 1930 were outside the legislative framework. Thus an unintended immunity from the incidence of taxation had been given to special powers of appointment created after 1897 but not exercised before the passage of the 1930 legislation. When experience disclosed this omission, the Legislature removed it in 1932. The

amendment of that year, which is copied in the margin,[1] included in the donee's gross estate appointive property which was not taxable at the donor's death but would have been taxable under the superseded statutory provision of 1897. It is under this amendment that New York has imposed the tax here assailed. This brings us to a consideration of appellants' claims.

As against this attempt by the State to devise a harmonious taxing system, appellants urge that New York exacts an unjustifiably heavier estate tax from the beneficiaries of Mrs. Vanderbilt's unrestricted property because in the accounting of her estate property was included of which she was not the "beneficial owner". Attacking the 1932 Act from another point of view, they claim that New York had no authority to draw a taxing line between special powers created prior to 1930 and those established thereafter.

Large concepts like "property" and "ownership" call for close analysis, especially when tax legislation is under scrutiny. Mrs. Vanderbilt, to be sure, had, in the conventional use of that term, no "beneficial interest" in the property which she transferred through the exercise of her power of appointment. She could not, that is to say, use the corpus of the trust herself or appoint it to her estate; nor could she have applied it to her creditors. These qualifications upon Mrs. Vanderbilt's power over the appointive property

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[1] The amendment provided that there should be included in the decedent's gross estate interests of which the following was part of the enumeration of defined categories:

7-a. To the extent of any property passing under a power of appointment exercised by the decedent (a) by will, or (b) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth . . . provided that the transfer of such property is not or was not subject to a death tax in the estate of the grantor of such power but would have been so taxable except for a statute providing that the tax on the transfer of such property should be imposed in the estate of the grantee of such power in the event of the exercise thereof.

The legislative history of this measure was thus summarized in the opinion of Surrogate Foley: "An explanatory memorandum of the State Tax Commission prepared at the time of the drafting and introduction of the legislative bill has been submitted to the surrogate by consent of the parties. It is illuminative of the reasons which led to the enactment of new subdivision 7-a. The State Tax Commission pointed out that the existing law in 1932, prior to the enactment of the subdivision, permitted the fund to escape taxation in both the estate of the grantor and the estate of the grantee of the power. It was stated in reference to the measure: 'This bill provides that property transferred by the exercise of a special or limited power of appointment shall be included in the decedent's gross estate for the purpose of the present estate tax in the event it is not taxable or has not been taxed in the estate of the grantor of the power and thus insures that one death tax will be imposed upon such property'." Matter of Vanderbilt, 163 Misc. (N. Y.) 667, 676.

had a significance during her lifetime which death transmuted. For when the end comes, the power that property gives, no matter how absolutely it may have been held, also comes to an end—except in so far as the power to determine its succession and enjoyment may be projected beyond the grave. But the exercise of this power is precisely the privilege which the state confers and upon which it seizes for the imposition of a tax. It is not the decedent's enjoyment of the property—the "beneficial interest"—which is the occasion for the tax, nor even the acquisition of such enjoyment by the individual beneficiaries. Presumably the policy behind estate tax legislation like that of New York is the diversion to the purposes of the community of a portion of the total current of wealth released by death.

In making this diversion, the state is not confined to that kind of wealth which was, in colloquial language, "owned" by a decedent before death, nor even to that over which he had an unrestricted power of testamentary disposition. It is enough that one person acquires economic interests in property through the death of another person, even though such acquisition is in part the automatic consequence of death or related to the decedent merely because of his power to designate to whom and in what proportions among a restricted class the benefits shall fall.

The books are replete with recognition of these general principles. Thus the full value of property may be taxed as part of a decedent's gross estate even though held by him merely as a tenant by the entirety, *Tyler* v. *United States*, 281 U. S. 497; likewise the full value of property in which the decedent was only a joint tenant may be taxed to his estate, *United States* v. *Jacobs*, 306 U. S. 363. In neither of these instances was there an exact equation between the "beneficial interest" owned by the decedent just before his death and that by which the tax was measured. Again, this Court found no difficulty in sustaining a tax on the transfer of property conveyed in trust by a decedent during his life, although he had divested himself of all beneficial interest in the corpus and had only reserved the power to change beneficiaries, excluding, however, himself and his estate from the range of choice. *Porter* v. *Commissioner*, 288 U. S. 436. The attempt to differentiate the tie that binds these cases by treating the *inter vivos* transfers in these decisions as mere substitutions for testamentary dispositions, disregards the emphasis in these cases on the practical effect of death in bringing

about a shift in economic interest, and the power of the legislature to fasten on that shift as the occasion for a tax. This broader base is emphasized, for instance, by the fact that in the *Porter* case the decedent had divested himself of all "beneficial interest" in the trust property prior to the passage of the taxing act by which the trust was included in the value of his gross estate.

A person may by his death bring into being greater interests in property than he himself has ever enjoyed, and the state may turn advantages thus realized into a source of revenue, as illustrated by earlier cases dealing with special powers of appointment that also came here from New York. *Orr* v. *Gilman*, 183 U. S. 278; *Chanler* v. *Kelsey*, 205 U. S. 466. In these cases, to be sure, a legacy tax was assailed—a tax, that is, measured by the specific interests which the beneficiaries of the power received. Here, the grievance is asserted ~~not by those taking under the power of appointment, but~~ by those succeeding to Mrs. Vanderbilt's free property. But if death may be made the occasion for taxing property in which the decedent had no "beneficial interest", then the measurement of that tax by the decedent's total wealth-disposing power is merely an exercise of legislative discretion in determining what the state shall take in return for allowing the transfer. The adoption of this measure may, of course, in the case of a graduated tax, burden individual beneficiaries beyond what they would bear if the same tax rate were applied to the value of the unrestricted property of the decedent and the property over which he had but a restricted control were excluded. There is nothing in the Fourteenth Amendment to prevent legislatures from devising death duties having this effect, nor to authorize courts to deny them the right to do so.

The circumstances of the present case illustrate the practical considerations which may induce a legislature to treat restricted and unrestricted property as a taxing unit. The potential interests of the beneficiaries of Mrs. Vanderbilt's free property are intertwined with their interests in the appointive property. The dispositions which she was free to make under her power of appointment served to enhance her freedom with respect to her own property. How Mrs. Vanderbilt would have distributed her individual property if she had possessed no control over that left by her husband is speculative. But it is certainly within the area of legislative judgment to assume that special powers of appointment are ordinarily designed for ends

similar to those in the present case—namely, to enlarge the donee's range of bounty, however narrowly restricted the enlargement may be, to a circle of beneficiaries closely related to, if not identical with, those whom the donee would be naturally disposed to favor. To the extent that this is true, there is compensation for those who may succeed to the donee's individual property, and who must pay a larger tax, because the appointive property is included in the gross estate. The legislature can hardly particularize the instances and draw up a tariff of compensations, and it is certainly not the province of courts to make the attempt. It suffices that the legislature has seen fit to frame a general enactment drawn on lines not offensive to experience and aimed at curing a revealed inequality in the state's taxing system.

Appellants vainly seek to draw strength from *Schlesinger* v. *Wisconsin*, 270 U. S. 230; *Hoeper* v. *Tax Commission*, 284 U. S. 206; and *Heiner* v. *Donnan*, 285 U. S. 312. The differences of opinion to which these cases gave rise are not here relevant.

But there remains the claim of appellants that in drawing the line between special powers created before 1930 and those having a later origin, New York ran afoul of the Equal Protection Clause. The brief summary we have given of the history of this legislation seems a sufficient answer to the charge of proscribed discrimination. To have continued the complete immunity from taxation which the 1930 legislation had unintentionally conferred upon special powers of appointment created before its passage was deemed by New York to have resulted in substantial inequality. The correction of such inequality is not a denial of the equality commanded by the Fourteenth Amendment. In the age-old but increasingly difficult task of tapping new sources of revenue, nothing may more legitimately attract the attention of financial statesmen than opportunities to reach property which has enjoyed immunity from tax burdens borne by others similarly situated. *Watson* v. *State Comptroller*, 254 U. S. 122; *Welch* v. *Henry*, 305 U. S. 134.

Acceptance of *Binney* v. *Long*, 299 U. S. 280, would not constrain us to hold differently. In the circumstances confronting the New York Legislature, as the Court of Appeals pointed out, the discrimination affecting special powers was not based upon what was deemed in the *Binney* case to be a date "arbitrarily selected but is a logical solution by the Legislature of a problem which it was

required to meet" 281 N. Y. at 317. All special powers, whether created before or after 1930, are taxed in New York. In one case, they are taxed to the donor's estate; in the other—since the same treatment would be manifestly impracticable—to the donee's. Differences in circumstances beget appropriate differences in law. The Equal Protection Clause was not designed to compel uniformity in the face of difference. *Madden, Jr.* v. *Kentucky*, No. 92, this Term.

The judgment below is

Affirmed.

Mr. Justice ROBERTS is of opinion that the instant case is indistinguishable in principle from *Binney* v. *Long*, 299 U. S. 280, and that, accordingly, the judgment should be reversed.

Mr. Justice MCREYNOLDS did not participate in the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

In *Binney* v. *Long*, *supra*, the Massachusetts legislation which a majority of this Court struck down sought to distinguish between the exercise of special powers created before 1907 and those created afterwards—1907 being the date of a change in Massachusetts' general method for taxing powers of appointment. But the powers actually taxed in that case were created before 1907 by an *inter vivos* transfer not made in contemplation of death; and Massachusetts made no attempt whatever to tax the exercise of special powers created in this manner after 1907.